87-889
No. _____

Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOSEPH COMPOY, WARDEN,
ATTORNEY OF THE STATE OF
CALIFORNIA,

Petitioner,

v.

NATHAN KEVIN TURNER,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
STEVE WHITE,
Chief Assistant Attorney
General
HARLEY D. MAYFIELD,
Assistant Attorney General
ROBERT M. FOSTER,
Supervising Deputy
Attorney General
RAQUEL M. GONZALEZ,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7253

Attorneys for Petitioner

TABLE OF CONTENTS

APPENDIX A

Ninth Circuit Opinion A-01 - A-15

APPENDIX B

District Court Order A-17 - A-18

APPENDIX C

California Supreme Court Minutes A-20 - A-27

APPENDIX D

California Court of Appeal Opinion A-29 - A-43

APPENDIX E

California Supreme Court Minutes A-45 - A-55

APPENDIX F

Excerpts from statistical tables in the 1987 California Judicial Council Report to the Governor and the Legislature, Chapter 2. Judicial Statistics, A. Supreme Court A-57 - A-59

APPENDIX A

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nathan Kevin Turner, Plaintiff -Appellant,	)	No. 85-6314
v.	)	D.C. No. CV-85-0783-G (IEG)
Joseph Compoy, Warden, Attorney of the State of California, Defendant-Appellee.	)	OPINION

Submitted May 19, 1987*

Filed September 3, 1987

Before: Procter Hug, Jr., Mary M. Schroeder and William A. Norris, Circuit Judges

Opinion by Judge Hug

Appeal from the United States District Court for the Souther District of California
Earl B. Gilliam, District Judge, Presiding

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

SUMMARY

Habeas Corpus

Appeal from a denial of habeas corpus. Reversed and remanded.

Appellant Turner was convicted in California state courts, and his conviction affirmed by the Court of Appeal. The California Supreme Court denied a petition for hearing, and he filed for federal habeas corpus relief, alleging denial of effective assistance of counsel. The district court denied review, holding that the California Supreme Court's denial of the direct appeal was not dispositive since the issue could be more appropriately handled by state collateral review, as factual inquiry was required.

[1] A prisoner generally need exhaust only one avenue of relief in

state court before bringing a habeas petition in federal court, even if alternative avenues of review are still available in state court. Since Turner raised each of his claims by direct state appeal, it appears unnecessary for him to have filed for state habeas relief. [2] States may mandate a particular procedure to be used to the exclusion of other avenues of seeking relief, [3] but California has not done so. Although the state supreme court did hold that if a record on appeal is insufficient to resolve an ineffective assistance of counsel claim it is more appropriate for the claim to be made in a state petition for habeas corpus, but [4] this is not adopted as a rule because to do so would ignore the distinctions between the review of federal trial decisions and those of state courts. Where a state's highest court gives no

opinion or citation when dismissing or denying a hearing, it is presumed that the dismissal or denial was on the merits. [5] The California court held that if the record is adequate, the court will decide the ineffective assistance issue, and if the record is inadequate the decision will be affirmed.

[6] The California Supreme Court will deny review in some cases because the appellant did not allege actions below the relevant standard, and this is a ruling on the merits. [7] It is apparent that this case cannot be read broadly as indicative of a preference that all ineffective assistance claims be pursued thorough the state habeas procedure. [8] Since it is not possible to ascertain the intent of the state supreme court's denial of hearing, it is necessary to continue to follow the presumption of a denial on the merits.

[9] California does no mandate collateral review. Turner has exhausted his state remedies.

COUNSEL

Nathan Kevin Turner, Tehachapi, California, for the petitioner-appellant.

Raquel M. Gonzalez, San Diego, California, for the respondent-appellee.

OPINION

HUG, Circuit Judge:

Nathan Turner, a California state prisoner, appeals the district court's denial of his petition for a writ of habeas corpus. Turner raises a number of issues, all of which were raised on direct appeal to the California courts. The district court ruled that Turner had failed to exhaust his state court

remedies because he had not sought relief by habeas corpus in the state court.

One of the issues raised by Turner is denial of effective assistance of counsel. The California Supreme Court has held that if the record on appeal is insufficient to resolve such a claim, it is more appropriate for the claim to be made in a state petition for habeas corpus. People v. Pope, 590 P.2d 859, 867, 152 Cal.Rptr. 732, 740 (1979). The issue in this case is whether a state prisoner must seek state habeas corpus relief in order to exhaust his state court remedies where the state supreme court has stated a preference for habeas review of a particular type of claim.

I.

After Turner was convicted, he appealed to the California Court of Appeal without success. The California Supreme Court denied Turner's petition

for hearing, without case citation or comment. Turner then filed for federal habeas corpus relief, alleging that he was denied effective assistance of counsel, his confession was improperly admitted at trial, an alternate juror was improperly seated, and his sentence was cruel and unusual. While all these claims had been raised in Turner's direct appeal to the state supreme court, the district court denied the petition for failure to exhaust state remedies. This ruling was based on the belief that the California Supreme Court's denial of Turner's direct appeal was not dispositive since the issues could be more appropriately handled by state collateral review, as they required factual inquiry.

II.

We review de novo the district court's denial of a petition for habeas

corpus. Jones v. United States, 783 F.2d 1477, 1479 (9th Cir. 1986).

[1] A federal district court must dismiss a federal habeas corpus petition that contains any claim as to which state remedies have not been exhausted. Rose v. Lundy, 455 U.S. 509, 522 (1982); 28 U.S.C. § 2254(b) (1982). Generally, however, a prisoner need exhaust only one avenue of relief in state court before bringing a habeas petition in federal court. This is true even where alternative avenues of reviewing constitutional issues are still available in state court. Hall v. Sumner, 682 F.2d 786, 788 (9th Cir. 1982); Thompson v. Procunier, 539 F.2d 26, 28 (9th Cir. 1976). Thus, since Turner raised each of his claims by direct appeal to the California Supreme Court, it appears unnecessary for him to have filed state habeas relief.

[2] States may, however, mandate a particular procedure to be used to the exclusion of other avenues of seeking relief "so long as the right of review is not foreclosed or unduly limited." Thompson, 539 F.2d at 28. In such states, presenting an issue to the state's highest court via a statutorily deviating path will not exhaust state remedies. Linquist v. Gardner, 770 F.2d 876, 878 (9th Cir. 1985). For example, Idaho statutes set out a procedural path to be utilized in presenting post-conviction claims. If the Idaho Supreme Court dismisses a claim which has not followed this path, we presume its dismissal was on procedural grounds, and therefore state remedies have not been exhausted. Id.

[3] Unlike Idaho, California has not instituted a mandatory procedure for filing petitions for relief from criminal

convictions. The California Supreme Court has stated, however, that if the *record on appeal is insufficient to* resolve an ineffective assistance of counsel claim, it is more appropriate for the claim to be made in a state petition for habeas corpus. Pope, 590 P.2d at 867, 152 Cal.Rptr. at 740; see also United States v. Birges, 723 F.2d 666, 670 (9th Cir.), cert. denied, 466 U.S. 943 & 469 U.S. 863 (1984). The issue to be resolved in this case is whether this preference should be treated in the same manner as a statutorily mandated procedure. A rule that state remedies have not been exhausted in this situation would be analogous to the rule utilized in the review of federal trials: where an ineffective assistance claim cannot be advanced without the development of facts outside the original record, the claim must be brought in a collateral

proceeding. See Birges, 723 F.2d at 670; 28 U.S.C. § 2255 (1982).

[4] We decline to adopt such a rule, as it ignores the distinctions between our role in reviewing federal trial decisions and those of state courts. The rule announced in Birges allows the circuit court, on direct appeal, to refuse to review an ineffective assistance of counsel claim where the record is insufficiently developed. The party will then be on notice that it is necessary to collaterally attack his or her conviction through habeas proceedings. In contrast, when the circuit court reviews a habeas petition from a state court conviction, it is necessary to ascertain whether the state courts have had an opportunity to resolve the issues raised on their merits. Thus, we have developed a presumption that where the state's highest court gives no

opinion or citation when dismissing or denying a hearing, it will be presumed that the dismissal or denial was on the merits. Kellotat v. Cupp, 719 F.2d 1027, 1030-31 (9th Cir. 1983); Thompson, 539 F.2d at 28. The question is whether the California Supreme Court's decision in Pope indicates that there should be an exception to this presumption that the state court reached the merits, analogous to the exception where a state has mandatory post-conviction procedures. See Lindquist, 770 F.2d at 878.

[5] Pope holds that if the record is adequate, the court will decide the ineffective assistance issue. 590 P.2d at 866, 152 Cal.Rptr. at 739. "Only where appellant identifies acts or omissions falling below [the applicable standard of adequate representation] does an appellate court examine whether the record includes an explanation for the

apparently inadequate representation." Id. at 868 n. 18, 152 Cal.Rptr. at 741 n. 18. Where the record is inadequate, the decision will be affirmed, to avoid speculation as to the reasons for counsel's actions. Id. at 867 & n. 16, 152 Cal.Rptr. at 740 & n. 16.

[6] Therefore, under Pope, we must assume that the California Supreme Court will deny review in some cases because the appellant did not allege actions below the relevant standard. This is a ruling on the merits. Only in some cases would the court reach the second step of the analysis, the adequacy of the record. Denial on this basis would be a procedural denial. Furthermore, the court also might have decided that the allegations fell below the standard, the record was adequate, and the reasons indicated that counsel had acted properly. This again is a ruling on the

merits. Thus, when the California Supreme Court denies a hearing on an ineffective assistance claim, the grounds on which it has done so are ambiguous.

[7] It is apparent, then, that Pope cannot be read broadly as indicative of a preference that all ineffective assistance claims be pursued thorough the state habeas procedure and not be raised on appeal. The only preference which is apparent is for parties to raise the ineffective assistance claim by joining a verified petition for habeas corpus to the direct appeal as a means of promoting judicial economy. Id. at 867 n. 17, 152 Cal.Rptr. at 740 n. 17.

[8] Since we cannot ascertain the intent of the California Supreme Court's denial of hearing, it is necessary in this situation to continue to follow the presumption of a denial on the merits. If a state statute, or perhaps an

explicit state supreme court ruling, mandates use of collateral review, then we will assume a denial is on procedural grounds. Also, if the denial of review is explicitly based on procedural grounds, or cites procedural authority, we will assume state remedies have not been exhausted. In all other cases, we will assume the state supreme court has been given a fair opportunity to review the merits.

[9] California does not mandate collateral review. The Supreme Court denied hearing to Turner without citation or discussion. We therefore presume the court reached the merits. Turner has exhausted his state remedies.

REVERSED AND REMANDED.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

N.K. TURNER, Plaintiff, v. JOSEPH CAMPOY, Defendant.	Civil No. 85-0783-G(IEG) ORDER DENYING WRIT OF HABEAS CORPUS

After reviewing all pleadings and supporting documents submitted by the parties relating to the above-entitled matter, the court finds that petitioner has failed to exhaust the remedies available to him in the courts of the State of California.

The filing of a petition for writ of habeas corpus at the State level would invoke an effective forum for redress of these issues. The denial of petitioner's request for hearing by the California Supreme Court is not dispositive of the

issues here presented; and, in fact, these issues are more appropriately raised by way of a State petition for writ of habeas corpus, as opposed to review on appeal, in that they require the determination of factual questions.

For the reasons set forth herein, under the provisions of 28 USC §§ 2254 (b) and (c), the court hereby denies the petition for writ of habeas corpus.

IT IS SO ORDERED.

Dated: June 18, 1985.

[Signed]
Earl B. Gilliam, Judge
United States District Court

APPENDIX C

APPENDIX C

MINUTES

SUPREME COURT

San Francisco, November 10, 1983

. . . .

(1 Crim. 23538/AO12670 Div.3) - People v. Jerome McDonald [146 Cal.App.3d 184]. Appellant's petition for hearing denied. The Reporter of decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed August 18, 1983, which appears at 146 Cal.3d 184. (Cal. Const., Art., VI, Section 14; Rule 976, Cal. Rules of Court.)

(1 Crim. 21235/AO13428 Div. 1) - People v. Cornell McCloud et al. [146 Cal.App.3d 180). Appellants' petitions for hearing denied.

(1 Civ. AO15543 Div. 2) - Fred W. Armstrong, Plaintiff and Respondent, v. Count of San Mateo, et al., Defendants &

Appellants/Robert E. Barrett, et al. v. County of Santa Clara, et al. [146 Cal.App.3d 597]. Grodin, J., did not participate. Petition of respondents, Robert E. Barrett, et al. denied. Bird, C.J., and Broussard, J., are of the opinion the petition should be granted.

(1 Civ. AO17474 Div. 4) - Boyll v. State Personnel Board et al. [146 Cal.App.3d 1070]. Respondents' petition for hearing denied.

(1 Crim. AO20191 Div. 1) - In the Matter of the Application of Dorsey Nunn and all other San Quentin Prisoners Similarly Situated for a Writ of Habeas Corpus. Petitioners' petition for hearing denied. Bird, C.J., Broussard, J. and Reynoso, Jr., are of the opinion the petition should be granted.

(1 Civ. AO23510 Div. 1) - Patrick Raymond Calligan, Petitioner v. Superior Court of the County of Contra Costa,

Respondent; People, Real Party in Interest. Petition for hearing denied. (See Penal Code § 1538.5 (m) and People v. Medina (1972) 6 Cal.3d 484, 491-492.) Mosk, J., and Grodin, J., are of the opinion the petition should be granted.

(1 Civ. AO24127 Div. 4) - Keith Lonnie Hammond, Petitioner v. Superior Court of the County of Alameda, Respondent; People, Real Party in Interest. Petition for hearing denied.

(1 Civ. 48784/A011762 Div. 4) - City of South San Francisco, Respondent v. Smith et al., Appellants. Acosta et al., Respondents. Respondent's petition for hearing denied.

(1 Civ. 51415/A010363 Div. 5) - Rue-Ell Enterprises, inc. v. City of Berkeley, et al. [147 Cal.App.3d 81]. Grodin, J., did not participate. Appellant's petition for hearing denied.

(1 Crim. 23485/AO12658 Div. 3) - People v. Roberto D. Villareal. Appellant's petition for hearing denied. Bird, C.J., is of the opinion the petition should be granted.

(1 Crim. 23576/AO11176 Div. 2) - People v. Raymond Earl Payton. Grodin, J., did not participate. Appellant's petition for hearing denied.

(1 Crim. 23641/AO12694 Div. 3) - People v. Wendell Stuart. Appellant's petition for hearing denied.

(1 Crim. 23970/AO16778 Div. 1) - People v. William A. Yeager. Appellant's petition for hearing denied. Mosk, J., is of the opinion the petition should be granted.

(2 Civ. B001444) - Michael Charles Davis, Petitioner v. Superior Court of the County of Los Angeles, Respondent; People, Real Party in Interest. Petition for hearing denied. Bird, C.J., and

Broussard, J., are of the opinion the petition should be granted.

(2 Civ. 63509 Div. 5) - Hersch et al. v. Citizens Savings and Loan Association et al. [146 Cal.App.3d 1002]. Appellant's petition for hearing denied.

(2 Crim. 41643 Div. 1) - People v. Francisco Menchaca [146 Cal.App.3d 1019]. Respondent's petition for hearing denied.

(2 Crim. 42472 Div.1) - People v. Jonathan Bennet Lowry. Appellant's petition for hearing denied. The request for an order directing publication of the opinion in the above entitled cause is denied.

(2 Crim. 43114 Div. 2) - People v. Byron Akira Miyamoto [146 Cal.App.3d 57]. Appellant's petition for hearing denied. The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled

appeal filed August 16, 1983, which appears at 146 Cal.3d 57. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

(3 Civ. 22469) - Independent Union of Public Service Employees v. County of Sacramento [147 Cal.App.3d 482]. Appellant's petition for hearing denied.

(3 Crim. 12423) - People v. Porfiro Sanchez. Appellant's petition for hearing denied.

(3 Civ. 23312) - Douglas Mozingo, Petitioner v. Superior Court of the County of Sacramento, Respondent; People, Real Party in Interest. Application for stay denied. Petition for hearing denied.

(3 Civ. 23383) - Ostling, Petitioner v. Superior Court of the County of Butte, Respondent; Ostling, Real Party in Interest. Application for stay and petition for hearing denied.

(4 Civ. 26455 Div. 1) - Bucciarelli et al. v. Pieper Etc., et al. Mosk, J., did not participate. Appellant's petition for hearing denied.

(4 Civ. 26678 Div. 1) - Presley of Southern California v. Whelan [146 Cal.App.3d 959]. Respondent's petition for hearing denied.

(4 Civ. 28107 Div. 1) - McLain Western #1 v. County of San Diego [146 Cal.App.3d 772]. Appellant's petition for hearing denied.

(4 Civ. 30990 Div. 3) - Bonnie Laverne Vanderwerff, Petitioner v. Superior Court of the County of Orange, Respondent; People Real Party in Interest. Application for stay and petition for hearing denied.

(4 Crim. 13857 Div. 1) - People v. Nathan Kevin Turner. Appellant's petition for hearing denied.

(4 Crim. 14498 Div. 2) - People v. Kelvin Shelby Malone. Appellant's petition for hearing denied.

(5 Civ. F002921) - Daniel Gordon Hook, Petitioner v. Superior Court of the County of Stanislaus, Respondent; People, Real Party in Interest. Application for stay and petition for hearing denied.

(5 Civ. F002990) - David Kent Davis, Petitioner v. The Municipal Court of Fresno County, Respondent; People, Real Party in Interest. Petition for hearing denied. Bird, C.J., Broussard, J. and Reynoso, J., are of the opinion the petition should be granted.

APPENDIX D

APPENDIX D

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	4 Crim.
v.	)	No. 13857
	)	
NATHAN KEVIN TURNER,	)	(Super.
	)	Ct. No.
Defendant and Appellant.	)	CR 56189)
	)	

Appeal from a judgment of the Superior Court of San Diego County, Donald W. Smith, Judge. Affirmed.

Nathan Kevin Turner meritlessly appeals his convictions on 17 counts of rape (Pen. Code, § 261, subd. (2)),[1/]

---

1. All statutory references are to the Penal Code.

with weapon use (§ 12022.3, subd. (b)), 12 counts of robbery (§ 211), with weapon use (§ 12022, subd. (b)), two counts of assault (§ 200), with weapon use (§ 12022, subd. (b)), and 1 count of peeping Tom activity (§ 647(h)).

The 17 rape-burglaries and the accompanying robberies and assaults generally fit a pattern in which Turner violently assaulted his helpless victims at knifepoint, threatened them with bodily harm or death, beating and choking them into submission.

Turner, a federal parolee who had a warrant outstanding for parole violations, was arrested by the San Diego Police, who saw him prowling on private property and peering though a residential window. At the San Diego Police Department headquarters detectives began to Mirandize Turner, telling him

"You have the right to remain silent . . . ." Turner, experienced in these matters, interrupted saying, "I know, I don't have to talk. If I do talk, it can be used in court, and I have the right to an attorney. I have been through all of this before. I know all of those rights. I'll talk to you. Let's let the peach grow."

A lengthy interrogation followed during which Turner stated he was a mechanic and owned three automobiles. Turner discussed his family problems, his hobbies, his health problems, and his experience with the federal criminal system.

Confronted with the series of rapes the police believed Turner was involved in, Turner said "I really only meant to take the money. I really didn't mean to do that to them." Turner described details of several of the crimes stating

he always wore surgical gloves while committing his crimes, having learned this while in prison. He identified the homes of two victims from photographs the police showed him. One of the detectives suggested they drive to the locations where the crimes had occurred so Turner could point them out. On the way, Turner was again reminded of his rights, and replied he was tired and wanted to remain silent, and if the police were going to use it in court against him, he wasn't going to shown them where he had committed his crimes. Questioning ceased and Turner was taken to a hospital for an examination. On the way into the hospital, they passed a box of surgical gloves, and Turner spontaneously pointed to them and said, "see those? Those are what I had." The blood tests taken for the police indicated measurable

quantities of phencyclidine (PCP) were in Turner's bloodstream.

At the close of trial, the judge properly instructed all jurors and alternates. Following a recess, one of the jurors requested reinstruction. During the same time, it became apparent one of the jurors would have to be replaced by an alternate. The alternate, who had been fully instructed initially, came in in the middle of the judge's reinstruction.

Discussion

TURNER'S STATEMENTS TO THE POLICE WERE PROPERLY ADMITTED

Turner meritlessly contends his statements to the police should have been excluded because he was under the influence of PCP at the time of his arrest. Turner relies on a laboratory report not introduced in evidence and calculations based on material cited in

his brief, but not in the record, concerning the effects of PCP use. There is no evidence in the record showing Turner was rendered incapable of voluntarily, knowingly and intelligently waiving his Miranda rights. If Turner is arguing any ingestion of PCP necessarily precludes a valid Miranda waiver, this is not supported in this record.

THE RECORD DOES NOT SHOW TRIAL COUNSEL TO BE INCOMPETENT

Turner claims defense counsel was incompetent, and bases his argument on several grounds.

Turner claims his counsel failed to obtain the police reports documenting the level of PCP in his blood several hours following his arrest. Omissions by trial counsel are grounds for reversal only if "it is reasonably probable a determination more favorable to the defendant would have resulted in the

absence of counsel's failings." (People v. Fosselman, 33 Cal.3d 572, 584, as modified at 33 Cal.3d 974a.)

Turner's counsel knew Turner was on PCP at the time of his arrest. At the pretrial motion to suppress the confession, Turner's trial counsel put Turner on the stand and the following exchange occurred:

> "Q Mr. Turner, based upon this police department report that I have shown you, they indicate that in fact at the time you were questioned by the officers you had some PCP in your system; is that true?
>
> "A Yes."
>
> "Q When you talked to Officer Dreis and Fragoso, did you feel that you understood what they were telling you?
>
> "A Yes.
>
> "Q Do you feel that you were perfectly clear in your mind as to the responses you made to them and the questions and statements they made to you?
>
> "A Yes."

Nothing in this record shows PCP affected Turner's ability to knowingly and intelligently assert his rights if he chose to do so. There is no showing his lawyer failed to obtain or analyze any relevant evidence.

In pretrial testimony, Turner testified he asserted his right to remain silent, and the detectives disregarded it. This is inconsistent with the theory he now advances. At that hearing he claimed he did make an intelligent decision when given his rights.

Turner further asserts, his trial counsel was incompetent because investigation might have disclosed Turner not only used PCP the day of his arrest but habitually used PCP, even on the occasion of each of the crimes for which he was convicted. Turner claims, had his counsel discovered this evidence (which he does not state even exists) counsel

might have been able to present a defense of diminished capacity at trial. There is nothing in the record to show Turner was under the influence of PCP at the time he committed any crime. Further, the most serious crimes of which Turner was convicted -- namely, the rapes -- were general intent, not specific intent, crimes. Thus, a defense of diminished capacity would not have been applicable to them. Again, the appellate record shows no attorney incompetency.

THE TRIAL COURT DID NOT REVERSIBLY ERR IN REFUSING TURNER'S REQUEST TO CHANGE COUNSEL

On the eve of trial Turner moved to replace trial counsel. When the court asked Turner why he wanted his lawyer removed, Turner replied he didn't feel his counsel was "working with me," and had visited him only three or four times in four months. The trial judge asked,

"Mr. Turner, is there anything else you want to tell me?" Turner replied, "No, that's about it."

On this record, the court needed make no further inquiry and was within its discretion to deny Turner's motion to change counsel on the eve of trial.

TURNER'S CONVICTION ON COUNT 32 IS SUPPORTED BY THE RECORD

Turner contends we should reverse as to count 32 -- the robbery of Debra -- because the evidence does not show a taking by means of force or fear from Debra's personal presence.[2/] Turner claims he took money from Debra's purse in her living room after he choked her into unconsciousness, asserting he only formed the intent to steal after she was unconscious and did not take by force or

---

2. Turner was sentenced to a total of 174 years and 4 months in prison. His sentence on count 32 was ordered to run concurrently with that sentence.

fear from her presence as required by statute (see § 211).

The evidence, however, would support a conclusion, obviously drawn by the jury, Turner intended both to rob and rape when he attacked Debra -- as he did with 11 other victims using an almost identical modus operandi.

Turner had the opportunity to present his side of the evidence to the jury; it is only our function to determine whether substantial evidence supports the jury's verdict. Here, the verdict is amply supported.

FAILURE TO INSTRUCT ONE OF THE ALTERNATE JURORS TWICE DOES NOT CONSTITUTE REVERSIBLE ERROR

In his opening brief, Turner contends one of the alternate jurors who ultimately voted on the verdicts of guilty was not completely instructed in the law because he came in in the middle of instruction to the rest of the jury.

However, the alternate juror was originally fully instructed along with the rest of the jury. The incident to which Turner refers was a reinstruction of the jury on the request of one of the original jurors. At this time the alternate juror was not yet one of the deliberating panel and had already been fully instructed on all issues. Turner does not show how he was prejudiced by the alternate being present during the rehearing of instructions with which he had already been charged.

TURNER'S SENTENCE IS CONSTITUTIONAL

Turner argues his prison sentence of 174 years and 4 months violates the proscriptions of the United States and California Constitutions against cruel and unusual punishment because it is disproportionate to the crimes he committed. Turner asserts he was sentenced, in effect, to life without the

possibility of parole. In fact, the record reflects he was properly sentenced according to relevant statutes. The length of his sentence is directly related to his penchant for repeating his criminal activities.

Turner relies on In re Lynch, 8 Cal.3d 410, for the proposition a punishment is unconstitutional if it is greater or equal to the punishment prescribed for more serious offenses. This case is readily distinguishable from Lynch. Lynch struck down a penalty of life imprisonment for one count of indecent exposure. In doing so, the Lynch court relied partly on the triviality of the offense, and the relative lack of serious danger to society. In contrast, Turner committed 17 separate, forcible rapes, as well as various other serious offenses. Turner argues as if his sentence were imposed

for a single isolated act of rape, rather than for a continuous pattern of serious violent conduct. The Legislature has not authorized a sentence of 174 years for a single act of rape, nor has Turner been sentenced for a single act of rape. The Legislature has made clear, however, its intent to punish those who perpetrate multiple forcible sex crimes for each separate victim. (§ 667.6, subd. (d).) In view of the number and nature of Turner's crimes, we do not believe the sentence given him is unconstitutional under the authorities on this question. (Cf. In re Lynch, supra, 8 Cal.3d 410; People v. Karsai, 131 Cal.App.3d 224, 240-243.)

Finally, Turner suggests he is a very sick individual, who should be given help, not prison. This concern is one for the Legislature.

Disposition

Affirmed.

[Signed]
WORK, J.

WE CONCUR:

[Signed]
BROWN, P.J.

[Signed]
LEWIS, J.*

*Assigned by the Chairperson of the Judicial Council.

APPENDIX E

APPENDIX E

MINUTES

SUPREME COURT

San Francisco, September 30, 1987

. . . .

(1 Dist. A027842 Div. 4 S001658) - People v. Aaron Lee Katz. Panelli, J., did not participate. Appellant's petition for review denied.

(1 Dist. A028960 Div. 1 S001795) - People v. Alan Wayne Fredericksen. Appellant's petition for review denied.

(1 Dist. A021872 Div. 2 S001812) - Royal Company Auctioneers, Inc., Respondent v. Coast Printing Equipment Company, Inc., et al., Appellants [193 Cal.App.3d 868]. Appellant's petition for review denied.

(1 Dist. A033380 Div. 4 S002146) - In re Marriage of Stringer; Stringer v. Huet. Appellant's petition for review denied.

(1 Dist. A0033766 Div. 4 S002127) - Sullwold et al. v. Abbett Electric Corporation [193 Cal.App.3d 708]. Respondent's petition for review denied.

(1 Dist. A034768 Div. 4 S002157) - People v. Michael Cushway [193 Cal.App.3d 776]. Appellant's petition for review denied.

(1 Dist. A035843 Div. 4 S002173) - People v. Corey Nevin Marshall. Appellant's petition for review denied.

(1 Dist. A027391 Div. 4 S002069) - In re Michael A. Ables on Habeas Corpus. Petition for review denied.

(1 Dist. A038640 Div. 1 S002108) - Sampson, Petitioner v. Workers' Compensation Appeals Board et al., Respondents. Petition for review denied.

(1 Dist. A039130 Div. 5 S002124) - Pagliasso, Petitioner v. Workers' Compensation Appeals Board et al., Respondents. Petition for review denied.

(1 Dist. A039644 Div. 5 S002308) - Black, Petitioner v. Superior Court of the City and County of San Francisco, Respondent; Kitchens, Real Party in Interest. Petition for review denied.

(1 Dist. A039695 Div. 2 S002373) - In re Ovell While on Habeas Corpus. Application for stay and petition for review denied.

(2 Dist. B008759 Div. 3 S002192) - Jones et al., Respondents v. Bugaj et al., Appellants. Respondents' petition for review denied.

(2 Dist. B009461 Div. 4 S002191) - Ledesma v. Patel et al. Respondents' petition for review denied.

(2 Dist. B009562 Div. 5 S002144) - Velzy Engineering and Machine, Inc., etc., Respondent v. Western Industrial Corporation et al., Appellants. Appellants' petition for review denied. The request for an order directing

publication of the opinion in the above entitled cause is denied.

(2 Dist. B015725 Div. 1 S002118) - Krone et al. v. Mission Insurance Company et al. Panelli, J., did not participate. Petition for review of respondents Arrow Insurance Company and Sam Arouesty denied.

(2 Dist. B016357 Div. 5 S002047) - Camacho et al., Respondents v. Schaefer, Appellant [193 Cal.App.3d 718]. Respondent's petition for review denied.

(2 Dist. B016415 Div. 6 S002052) - Baker, Respondent v. Collins, Appellant. Appellant's petition for review denied.

(2 Dist. B016951 Div. 7 S002092) - Petersons, M.D. v. Dolinky et al. Respondents' petition for review denied.

(2 Dist. B018776 Div. 4 S001958) - People v. Eddie Gerry Story. Appellant's petition for review denied.

(2 Dist. B021288 Div. 6 S001736) - People v. Leroy Jack Massey [192 Cal.App.3d 819]. Appellant's petition for review denied.

(2 Dist. B021411 Div. 2 S002111) - People v. Richard Johnson. Appellant's petition for review denied.

(2 Dist. B021785 Div. 5 S002147) - Martinez et al. v. Pacific Telephone etc. et al. Appellant's petition for review denied.

(2 Dist. B021787 Div. 7 S002120) - People v. Regina Navarro. Appellant's petition for review denied.

(2 Dist. B022653 Div. 2 S002176) - People v. George Raymond Ernesto Lewis. Appellant's petition for review denied.

(2 Dist. B022743 Div. 5 S001949) - Victor Martinez Rodriguez, Petitioner v. Superior Court of the County of Los Angeles, Respondent; People, Real Party

in Interest. Petition for review is denied.

(2 Dist. B023051 Div. 7 S001757) - People v. Jose Francisco Ochoa et al. Petition for review of appellant Julian Vargas denied.

(2 Dist. B023140 Div. 5 S002145) - Morton, Petitioner v. Workers' Compensation Appeals Board et al., Respondents [193 Cal.App.3d 924]. Petition for review denied.

(2 Dist. B026943 Div. 3 S001979) - Landmark Holding Group, Inc. et al., Petitioners v. Superior Court of the County of Los Angeles, Respondent; California Bell Club et al., Real Parties in Interest. [193 Cal.App.3d 525]. Respondent's petition for review denied.

(2 Dist. B027472 Div. 2 S002174) - Kim, a Minor, etc. et al. v. Orange County et al. Appellant's petition for review denied.

(2 Dist. B027542 Div. 2 S001732) - Natca, Inc. et al., Petitioners v. Superior Court of the County of Los Angeles, Respondent; Holiday Inn, Inc. et al., Real Parties in Interest. Petitioners' petition for review denied.

(2 Dist. B027663 Div. 5 S002097) - Thomas, Petitioner v. Workers' Compensation Appeals Board et al., Respondents. Petition for review denied.

(2 Dist. B028178 Div. 7 S001574) - Michael Alexander, Petitioner v. Superior Court of the County of Los Angeles, Respondent; Growth Investments, Inc., etc. et al., Real Parties in Interest. Petition for review denied.

(2 Dist. B029155 Div. 1 S002109) - Kitchell Contractors, Inc., Petitioner v. Superior Court of the County of Los Angeles, Respondent; The Lutheran Hospital Society of Southern California

al., Real Parties in Interest. Petition for review denied.

(3 Dist. C001151 S002228) - People v. Troy Adam Ashmus. Appellant's petition for review denied.

(3 Dist. C002547 S001960) - American Standard, Petitioner v. Superior Court of the County of Sacramento, Respondent; Southern Pacific Transportation Company, Real Party in Interest. Petition for review denied.

(3 Dist. C001334 S001686) - People v. Sandra Lee Ellington. Appellant's petition for review denied.

(3 Dist. C001388 S001837) - People v. Ralph Hernandez Aguilar. Appellant's petition for review denied.

(3 Dist. C001524 S001744) - People v. Clifton Williams. Appellant's petition for review denied.

(4 Dist. D004320 Div. 1 S002179) - O'Rourke et al. v. Department of Social

Services, etc. Appellant's petition for review denied.

(4 Dist. D004733 Div. 1 S001956) - People v. Chris Leon Spells. Petitions for review denied.

(4 Dist. D006656 Div. 1 S002110) - Intervest Resources, Inc., Petitioner v. Superior Court of the County of San Diego, Respondent; Poinsettia Park Joint Venture et al., Real Parties in Interest. Petition for review denied.

(4 Dist. G003404 Div. 3 S001930) - People v. Dat Vuong. Appellant's petition for review denied.

(4 Dist. G003469 Div. 3 S001706) - People v. Marjorie Jane Mobley. Appellant's petition for review denied.

(4 Dist. G005635 Div. 3 S001982) - James Clifford Logan, Petitioner v. Superior Court of the County of Orange, Respondent; People, Real Party in Interest. Petition for review denied.

(5 Dist. F006408 S001816) - People v. Howard Lee Rufus. Appellant's petition for review denied.

(5 Dist. F007525 S001710) - In re Eladio Johnny A., a Minor; People v. Eladio Johnny A. Appellant's petition for review denied.

(5 Dist. F009008 S002129) - Pepsi Cola San Joaquin Bottling Company et al., Petitioners v. Superior Court of the County of Stanislaus, Respondent; McGee et al., Real Parties in Interest. Petitioners' petition for review denied.

(6 Dist. H001687 S001622) - People v. Bobby Ray Wittmeier. Appellant's petition for review denied. The request for an order directing publication of the opinion in the above entitled cause is denied.

(6 Dist. H003225 S002114) - Davis, Petitioner v. Workers' Compensation

Appeals Board et al., Respondents. Petition for review denied.

(6 Dist. H003349 S001822) - In re Charles Fleck on Habeas Corpus. Petition for review denied.

(6 Dist. H003427 S002141) - Joseph Robert Reuter, Petitioner v. Superior Court of the County of Santa Clara, Respondent; Silva, etc., Real Party in Interest. Petition for review denied.

APPENDIX F

APPENDIX F

TABLE T-1--CALIFORNIA SUPREME COURT SUMMARY OF FILINGS FISCAL YEARS 1976-77 THROUGH 1985-86

Fiscal year	Total filings	Petitions for review in cases previously decided by Courts of Appeal[1]		
		Total	Appeals	
			Civil	Crim.
			NUMBER	
1976-77	3,665	2,927	1,230	1,033
1977-78	3,881	3,140	1,186	1,170
1978-79	3,612	3,006	812	1,100
1979-80	3,858 [2]	3,183	944	1,100

1. A petition for review in the Supreme Court was formerly called a petition for hearing. The name was legally changed by Proposition 32, which took effect on May 6, 1985. Prior to 1978-79, a change in the method of counting petitions for hearing inadvertently introduced a change in definition. Petitions for hearing in 1978-79 and subsequent years are correct. Data reported for prior years may not, therefore, be fully comparable to the data for 1978-79 and subsequent years.

2. Three petitions were withdrawn after filing.

TABLE T-1--CONTINUED

Fiscal year	Total filings	Petitions for review in cases previously decided by Courts of Appeal: Total	Appeals: Civil	Appeals: Crim.
			NUMBER	
1980-81	3,864	3,179	925	1,132
1981-82	4,056	3/ 3,338	921	1,148
1982-83	3,856	3,205	942	1,050
1983-84	4,025	3,244	1,100	1,071
1984-85	4,370	3,464	1,020	1,203
1985-86	4,827	3,834	1,044	1,444
. . . .				

3. Since 1981-82, based on a count of petitions filed. Count in prior years was based on the record of those disposed of during the fiscal year because of the short time between filing and action upon a petition (see Cal. Rules of Court, rule 28(a) and (e)).

TABLE T-6--CALIFORNIA SUPREME COURT PETITIONS FOR REVIEW GRANTED AND DENIED BY TYPE OF PROCEEDING

Fiscal Years . . . 1985-86

Type of proceeding	1985-86 Total Decided	Granted No.	Granted %	Denied
Total	3,728	278	7	3,450
Civil appeals	991	69	7	992
Criminal appeals	1,346	99	7	1,247
Civil original proceedings	876	69	8	807
Criminal original proceedings	515	41	8	474

No. 87-889

Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOSEPH COMPOY, WARDEN,
ATTORNEY OF THE STATE OF
CALIFORNIA,

Petitioner,

v.

NATHAN KEVIN TURNER,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
STEVE WHITE,
Chief Assistant Attorney
General
HARLEY D. MAYFIELD,
Assistant Attorney General
ROBERT M. FOSTER,
Supervising Deputy
Attorney General
RAQUEL M. GONZALEZ,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7253

Attorneys for Petitioner

65 pp

TABLE OF CONTENTS

APPENDIX A

Ninth Circuit Opinion A-01 - A-15

APPENDIX B

District Court Order A-17 - A-18

APPENDIX C

California Supreme Court Minutes A-20 - A-27

APPENDIX D

California Court of Appeal Opinion A-29 - A-43

APPENDIX E

California Supreme Court Minutes A-45 - A-55

APPENDIX F

Excerpts from statistical tables in the 1987 California Judicial Council Report to the Governor and the Legislature, Chapter 2. Judicial Statistics, A. Supreme Court A-57 - A-59

APPENDIX A

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nathan Kevin Turner, Plaintiff -Appellant,	)	No. 85-6314
v.	)	D.C. No. CV-85-0783-G (IEG)
Joseph Compoy, Warden, Attorney of the State of California, Defendant-Appellee.	)	OPINION

Submitted May 19, 1987*

Filed September 3, 1987

Before: Procter Hug, Jr., Mary M. Schroeder and William A. Norris, Circuit Judges

Opinion by Judge Hug

Appeal from the United States District Court for the Souther District of California
Earl B. Gilliam, District Judge, Presiding

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

SUMMARY

Habeas Corpus

Appeal from a denial of habeas corpus. Reversed and remanded.

Appellant Turner was convicted in California state courts, and his conviction affirmed by the Court of Appeal. The California Supreme Court denied a petition for hearing, and he filed for federal habeas corpus relief, alleging denial of effective assistance of counsel. The district court denied review, holding that the California Supreme Court's denial of the direct appeal was not dispositive since the issue could be more appropriately handled by state collateral review, as factual inquiry was required.

[1] A prisoner generally need exhaust only one avenue of relief in

state court before bringing a habeas petition in federal court, even if alternative avenues of review are still available in state court. Since Turner raised each of his claims by direct state appeal, it appears unnecessary for him to have filed for state habeas relief. [2] States may mandate a particular procedure to be used to the exclusion of other avenues of seeking relief, [3] but California has not done so. Although the state supreme court did hold that if a record on appeal is insufficient to resolve an ineffective assistance of counsel claim it is more appropriate for the claim to be made in a state petition for habeas corpus, but [4] this is not adopted as a rule because to do so would ignore the distinctions between the review of federal trial decisions and those of state courts. Where a state's highest court gives no

opinion or citation when dismissing or denying a hearing, it is presumed that the dismissal or denial was on the merits. [5] The California court held that if the record is adequate, the court will decide the ineffective assistance issue, and if the record is inadequate the decision will be affirmed.

[6] The California Supreme Court will deny review in some cases because the appellant did not allege actions below the relevant standard, and this is a ruling on the merits. [7] It is apparent that this case cannot be read broadly as indicative of a preference that all ineffective assistance claims be pursued thorough the state habeas procedure. [8] Since it is not possible to ascertain the intent of the state supreme court's denial of hearing, it is necessary to continue to follow the presumption of a denial on the merits.

[9] California does no mandate collateral review. Turner has exhausted his state remedies.

COUNSEL

Nathan Kevin Turner, Tehachapi, California, for the petitioner-appellant.

Raquel M. Gonzalez, San Diego, California, for the respondent-appellee.

OPINION

HUG, Circuit Judge:

Nathan Turner, a California state prisoner, appeals the district court's denial of his petition for a writ of habeas corpus. Turner raises a number of issues, all of which were raised on direct appeal to the California courts. The district court ruled that Turner had failed to exhaust his state court

remedies because he had not sought relief by habeas corpus in the state court.

One of the issues raised by Turner is denial of effective assistance of counsel. The California Supreme Court has held that if the record on appeal is insufficient to resolve such a claim, it is more appropriate for the claim to be made in a state petition for habeas corpus. People v. Pope, 590 P.2d 859, 867, 152 Cal.Rptr. 732, 740 (1979). The issue in this case is whether a state prisoner must seek state habeas corpus relief in order to exhaust his state court remedies where the state supreme court has stated a preference for habeas review of a particular type of claim.

I.

After Turner was convicted, he appealed to the California Court of Appeal without success. The California Supreme Court denied Turner's petition

for hearing, without case citation or comment. Turner then filed for federal habeas corpus relief, alleging that he was denied effective assistance of counsel, his confession was improperly admitted at trial, an alternate juror was improperly seated, and his sentence was cruel and unusual. While all these claims had been raised in Turner's direct appeal to the state supreme court, the district court denied the petition for failure to exhaust state remedies. This ruling was based on the belief that the California Supreme Court's denial of Turner's direct appeal was not dispositive since the issues could be more appropriately handled by state collateral review, as they required factual inquiry.

II.

We review de novo the district court's denial of a petition for habeas

corpus. Jones v. United States, 783 F.2d 1477, 1479 (9th Cir. 1986).

[1] A federal district court must dismiss a federal habeas corpus petition that contains any claim as to which state remedies have not been exhausted. Rose v. Lundy, 455 U.S. 509, 522 (1982); 28 U.S.C. § 2254(b) (1982). Generally, however, a prisoner need exhaust only one avenue of relief in state court before bringing a habeas petition in federal court. This is true even where alternative avenues of reviewing constitutional issues are still available in state court. Hall v. Sumner, 682 F.2d 786, 788 (9th Cir. 1982); Thompson v. Procunier, 539 F.2d 26, 28 (9th Cir. 1976). Thus, since Turner raised each of his claims by direct appeal to the California Supreme Court, it appears unnecessary for him to have filed state habeas relief.

[2] States may, however, mandate a particular procedure to be used to the exclusion of other avenues of seeking relief "so long as the right of review is not foreclosed or unduly limited." Thompson, 539 F.2d at 28. In such states, presenting an issue to the state's highest court via a statutorily deviating path will not exhaust state remedies. Linquist v. Gardner, 770 F.2d 876, 878 (9th Cir. 1985). For example, Idaho statutes set out a procedural path to be utilized in presenting post-conviction claims. If the Idaho Supreme Court dismisses a claim which has not followed this path, we presume its dismissal was on procedural grounds, and therefore state remedies have not been exhausted. Id.

[3] Unlike Idaho, California has not instituted a mandatory procedure for filing petitions for relief from criminal

convictions. The California Supreme Court has stated, however, that if the record on appeal is insufficient to resolve an ineffective assistance of counsel claim, it is more appropriate for the claim to be made in a state petition for habeas corpus. Pope, 590 P.2d at 867, 152 Cal.Rptr. at 740; see also United States v. Birges, 723 F.2d 666, 670 (9th Cir.), cert. denied, 466 U.S. 943 & 469 U.S. 863 (1984). The issue to be resolved in this case is whether this preference should be treated in the same manner as a statutorily mandated procedure. A rule that state remedies have not been exhausted in this situation would be analogous to the rule utilized in the review of federal trials: where an ineffective assistance claim cannot be advanced without the development of facts outside the original record, the claim must be brought in a collateral

proceeding. See Birges, 723 F.2d at 670; 28 U.S.C. § 2255 (1982).

[4] We decline to adopt such a rule, as it ignores the distinctions between our role in reviewing federal trial decisions and those of state courts. The rule announced in Birges allows the circuit court, on direct appeal, to refuse to review an ineffective assistance of counsel claim where the record is insufficiently developed. The party will then be on notice that it is necessary to collaterally attack his or her conviction through habeas proceedings. In contrast, when the circuit court reviews a habeas petition from a state court conviction, it is necessary to ascertain whether the state courts have had an opportunity to resolve the issues raised on their merits. Thus, we have developed a presumption that where the state's highest court gives no

opinion or citation when dismissing or denying a hearing, it will be presumed that the dismissal or denial was on the merits. Kellotat v. Cupp, 719 F.2d 1027, 1030-31 (9th Cir. 1983); Thompson, 539 F.2d at 28. The question is whether the California Supreme Court's decision in Pope indicates that there should be an exception to this presumption that the state court reached the merits, analogous to the exception where a state has mandatory post-conviction procedures. See Lindquist, 770 F.2d at 878.

[5] Pope holds that if the record is adequate, the court will decide the ineffective assistance issue. 590 P.2d at 866, 152 Cal.Rptr. at 739. "Only where appellant identifies acts or omissions falling below [the applicable standard of adequate representation] does an appellate court examine whether the record includes an explanation for the

apparently inadequate representation." Id. at 868 n. 18, 152 Cal.Rptr. at 741 n. 18. Where the record is inadequate, the decision will be affirmed, to avoid speculation as to the reasons for counsel's actions. Id. at 867 & n. 16, 152 Cal.Rptr. at 740 & n. 16.

[6] Therefore, under Pope, we must assume that the California Supreme Court will deny review in some cases because the appellant did not allege actions below the relevant standard. This is a ruling on the merits. Only in some cases would the court reach the second step of the analysis, the adequacy of the record. Denial on this basis would be a procedural denial. Furthermore, the court also might have decided that the allegations fell below the standard, the record was adequate, and the reasons indicated that counsel had acted properly. This again is a ruling on the

merits. Thus, when the California Supreme Court denies a hearing on an ineffective assistance claim, the grounds on which it has done so are ambiguous.

[7] It is apparent, then, that Pope cannot be read broadly as indicative of a preference that all ineffective assistance claims be pursued thorough the state habeas procedure and not be raised on appeal. The only preference which is apparent is for parties to raise the ineffective assistance claim by joining a verified petition for habeas corpus to the direct appeal as a means of promoting judicial economy. Id. at 867 n. 17, 152 Cal.Rptr. at 740 n. 17.

[8] Since we cannot ascertain the intent of the California Supreme Court's denial of hearing, it is necessary in this situation to continue to follow the presumption of a denial on the merits. If a state statute, or perhaps an

explicit state supreme court ruling, mandates use of collateral review, then we will assume a denial is on procedural grounds. Also, if the denial of review is explicitly based on procedural grounds, or cites procedural authority, we will assume state remedies have not been exhausted. In all other cases, we will assume the state supreme court has been given a fair opportunity to review the merits.

[9] California does not mandate collateral review. The Supreme Court denied hearing to Turner without citation or discussion. We therefore presume the court reached the merits. Turner has exhausted his state remedies.

REVERSED AND REMANDED.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

N.K. TURNER, Plaintiff,	)	Civil No. 85-0783-G(IEG)
v.	)	ORDER DENYING WRIT OF HABEAS CORPUS
JOSEPH CAMPOY, Defendant.	)	

After reviewing all pleadings and supporting documents submitted by the parties relating to the above-entitled matter, the court finds that petitioner has failed to exhaust the remedies available to him in the courts of the State of California.

The filing of a petition for writ of habeas corpus at the State level would invoke an effective forum for redress of these issues. The denial of petitioner's request for hearing by the California Supreme Court is not dispositive of the

issues here presented; and, in fact, these issues are more appropriately raised by way of a State petition for writ of habeas corpus, as opposed to review on appeal, in that they require the determination of factual questions.

For the reasons set forth herein, under the provisions of 28 USC §§ 2254 (b) and (c), the court hereby denies the petition for writ of habeas corpus.

IT IS SO ORDERED.

Dated: June 18, 1985.

[Signed]
Earl B. Gilliam, Judge
United States District Court

APPENDIX C

APPENDIX C

MINUTES

SUPREME COURT

San Francisco, November 10, 1983

. . . .

(1 Crim. 23538/AO12670 Div.3) - People v. Jerome McDonald [146 Cal.App.3d 184]. Appellant's petition for hearing denied. The Reporter of decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed August 18, 1983, which appears at 146 Cal.3d 184. (Cal. Const., Art., VI, Section 14; Rule 976, Cal. Rules of Court.)

(1 Crim. 21235/AO13428 Div. 1) - People v. Cornell McCloud et al. [146 Cal.App.3d 180). Appellants' petitions for hearing denied.

(1 Civ. AO15543 Div. 2) - Fred W. Armstrong, Plaintiff and Respondent, v. Count of San Mateo, et al., Defendants &

Appellants/Robert E. Barrett, et al. v. County of Santa Clara, et al. [146 Cal.App.3d 597]. Grodin, J., did not participate. Petition of respondents, Robert E. Barrett, et al. denied. Bird, C.J., and Broussard, J., are of the opinion the petition should be granted.

(1 Civ. AO17474 Div. 4) - Boyll v. State Personnel Board et al. [146 Cal.App.3d 1070]. Respondents' petition for hearing denied.

(1 Crim. AO20191 Div. 1) - In the Matter of the Application of Dorsey Nunn and all other San Quentin Prisoners Similarly Situated for a Writ of Habeas Corpus. Petitioners' petition for hearing denied. Bird, C.J., Broussard, J. and Reynoso, Jr., are of the opinion the petition should be granted.

(1 Civ. AO23510 Div. 1) - Patrick Raymond Calligan, Petitioner v. Superior Court of the County of Contra Costa,

Respondent; People, Real Party in Interest. Petition for hearing denied. (See Penal Code § 1538.5 (m) and People v. Medina (1972) 6 Cal.3d 484, 491-492.) Mosk, J., and Grodin, J., are of the opinion the petition should be granted.

(1 Civ. AO24127 Div. 4) - Keith Lonnie Hammond, Petitioner v. Superior Court of the County of Alameda, Respondent; People, Real Party in Interest. Petition for hearing denied.

(1 Civ. 48784/A011762 Div. 4) - City of South San Francisco, Respondent v. Smith et al., Appellants. Acosta et al., Respondents. Respondent's petition for hearing denied.

(1 Civ. 51415/A010363 Div. 5) - Rue-Ell Enterprises, inc. v. City of Berkeley, et al. [147 Cal.App.3d 81]. Grodin, J., did not participate. Appellant's petition for hearing denied.

(1 Crim. 23485/AO12658 Div. 3) - People v. Roberto D. Villareal. Appellant's petition for hearing denied. Bird, C.J., is of the opinion the petition should be granted.

(1 Crim. 23576/AO11176 Div. 2) - People v. Raymond Earl Payton. Grodin, J., did not participate. Appellant's petition for hearing denied.

(1 Crim. 23641/AO12694 Div. 3) - People v. Wendell Stuart. Appellant's petition for hearing denied.

(1 Crim. 23970/AO16778 Div. 1) - People v. William A. Yeager. Appellant's petition for hearing denied. Mosk, J., is of the opinion the petition should be granted.

(2 Civ. B001444) - Michael Charles Davis, Petitioner v. Superior Court of the County of Los Angeles, Respondent; People, Real Party in Interest. Petition for hearing denied. Bird, C.J., and

Broussard, J., are of the opinion the petition should be granted.

(2 Civ. 63509 Div. 5) - Hersch et al. v. Citizens Savings and Loan Association et al. [146 Cal.App.3d 1002]. Appellant's petition for hearing denied.

(2 Crim. 41643 Div. 1) - People v. Francisco Menchaca [146 Cal.App.3d 1019]. Respondent's petition for hearing denied.

(2 Crim. 42472 Div.1) - People v. Jonathan Bennet Lowry. Appellant's petition for hearing denied. The request for an order directing publication of the opinion in the above entitled cause is denied.

(2 Crim. 43114 Div. 2) - People v. Byron Akira Miyamoto [146 Cal.App.3d 57]. Appellant's petition for hearing denied. The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled

appeal filed August 16, 1983, which appears at 146 Cal.3d 57. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

(3 Civ. 22469) - Independent Union of Public Service Employees v. County of Sacramento [147 Cal.App.3d 482]. Appellant's petition for hearing denied.

(3 Crim. 12423) - People v. Porfiro Sanchez. Appellant's petition for hearing denied.

(3 Civ. 23312) - Douglas Mozingo, Petitioner v. Superior Court of the County of Sacramento, Respondent; People, Real Party in Interest. Application for stay denied. Petition for hearing denied.

(3 Civ. 23383) - Ostling, Petitioner v. Superior Court of the County of Butte, Respondent; Ostling, Real Party in Interest. Application for stay and petition for hearing denied.

(4 Civ. 26455 Div. 1) - Bucciarelli et al. v. Pieper Etc., et al. Mosk, J., did not participate. Appellant's petition for hearing denied.

(4 Civ. 26678 Div. 1) - Presley of Southern California v. Whelan [146 Cal.App.3d 959]. Respondent's petition for hearing denied.

(4 Civ. 28107 Div. 1) - McLain Western #1 v. County of San Diego [146 Cal.App.3d 772]. Appellant's petition for hearing denied.

(4 Civ. 30990 Div. 3) - Bonnie Laverne Vanderwerff, Petitioner v. Superior Court of the County of Orange, Respondent; People Real Party in Interest. Application for stay and petition for hearing denied.

(4 Crim. 13857 Div. 1) - People v. Nathan Kevin Turner. Appellant's petition for hearing denied.

(4 Crim. 14498 Div. 2) - People v. Kelvin Shelby Malone. Appellant's petition for hearing denied.

(5 Civ. F002921) - Daniel Gordon Hook, Petitioner v. Superior Court of the County of Stanislaus, Respondent; People, Real Party in Interest. Application for stay and petition for hearing denied.

(5 Civ. F002990) - David Kent Davis, Petitioner v. The Municipal Court of Fresno County, Respondent; People, Real Party in Interest. Petition for hearing denied. Bird, C.J., Broussard, J. and Reynoso, J., are of the opinion the petition should be granted.

APPENDIX D

APPENDIX D

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	4 Crim.
v.	)	No. 13857
	)	
NATHAN KEVIN TURNER,	)	(Super.
	)	Ct. No.
Defendant and Appellant.	)	CR 56189)
	)	

Appeal from a judgment of the Superior Court of San Diego County, Donald W. Smith, Judge. Affirmed.

Nathan Kevin Turner meritlessly appeals his convictions on 17 counts of rape (Pen. Code, § 261, subd. (2)),[1/]

---

1. All statutory references are to the Penal Code.

with weapon use (§ 12022.3, subd. (b)), 12 counts of robbery (§ 211), with weapon use (§ 12022, subd. (b)), two counts of assault (§ 200), with weapon use (§ 12022, subd. (b)), and 1 count of peeping Tom activity (§ 647(h)).

The 17 rape-burglaries and the accompanying robberies and assaults generally fit a pattern in which Turner violently assaulted his helpless victims at knifepoint, threatened them with bodily harm or death, beating and choking them into submission.

Turner, a federal parolee who had a warrant outstanding for parole violations, was arrested by the San Diego Police, who saw him prowling on private property and peering though a residential window. At the San Diego Police Department headquarters detectives began to Mirandize Turner, telling him

"You have the right to remain silent . . . ." Turner, experienced in these matters, interrupted saying, "I know, I don't have to talk. If I do talk, it can be used in court, and I have the right to an attorney. I have been through all of this before. I know all of those rights. I'll talk to you. Let's let the peach grow."

A lengthy interrogation followed during which Turner stated he was a mechanic and owned three automobiles. Turner discussed his family problems, his hobbies, his health problems, and his experience with the federal criminal system.

Confronted with the series of rapes the police believed Turner was involved in, Turner said "I really only meant to take the money. I really didn't mean to do that to them." Turner described details of several of the crimes stating

he always wore surgical gloves while committing his crimes, having learned this while in prison. He identified the homes of two victims from photographs the police showed him. One of the detectives suggested they drive to the locations where the crimes had occurred so Turner could point them out. On the way, Turner was again reminded of his rights, and replied he was tired and wanted to remain silent, and if the police were going to use it in court against him, he wasn't going to shown them where he had committed his crimes. Questioning ceased and Turner was taken to a hospital for an examination. On the way into the hospital, they passed a box of surgical gloves, and Turner spontaneously pointed to them and said, "see those? Those are what I had." The blood tests taken for the police indicated measurable

quantities of phencyclidine (PCP) were in Turner's bloodstream.

At the close of trial, the judge properly instructed all jurors and alternates. Following a recess, one of the jurors requested reinstruction. During the same time, it became apparent one of the jurors would have to be replaced by an alternate. The alternate, who had been fully instructed initially, came in in the middle of the judge's reinstruction.

Discussion

TURNER'S STATEMENTS TO THE POLICE WERE PROPERLY ADMITTED

Turner meritlessly contends his statements to the police should have been excluded because he was under the influence of PCP at the time of his arrest. Turner relies on a laboratory report not introduced in evidence and calculations based on material cited in

his brief, but not in the record, concerning the effects of PCP use. There is no evidence in the record showing Turner was rendered incapable of voluntarily, knowingly and intelligently waiving his Miranda rights. If Turner is arguing any ingestion of PCP necessarily precludes a valid Miranda waiver, this is not supported in this record.

THE RECORD DOES NOT SHOW TRIAL COUNSEL TO BE INCOMPETENT

Turner claims defense counsel was incompetent, and bases his argument on several grounds.

Turner claims his counsel failed to obtain the police reports documenting the level of PCP in his blood several hours following his arrest. Omissions by trial counsel are grounds for reversal only if "it is reasonably probable a determination more favorable to the defendant would have resulted in the

absence of counsel's failings." (People v. Fosselman, 33 Cal.3d 572, 584, as modified at 33 Cal.3d 974a.)

Turner's counsel knew Turner was on PCP at the time of his arrest. At the pretrial motion to suppress the confession, Turner's trial counsel put Turner on the stand and the following exchange occurred:

> "Q Mr. Turner, based upon this police department report that I have shown you, they indicate that in fact at the time you were questioned by the officers you had some PCP in your system; is that true?
>
> "A Yes."
>
> "Q When you talked to Officer Dreis and Fragoso, did you feel that you understood what they were telling you?
>
> "A Yes.
>
> "Q Do you feel that you were perfectly clear in your mind as to the responses you made to them and the questions and statements they made to you?
>
> "A Yes."

Nothing in this record shows PCP affected Turner's ability to knowingly and intelligently assert his rights if he chose to do so. There is no showing his lawyer failed to obtain or analyze any relevant evidence.

In pretrial testimony, Turner testified he asserted his right to remain silent, and the detectives disregarded it. This is inconsistent with the theory he now advances. At that hearing he claimed he did make an intelligent decision when given his rights.

Turner further asserts, his trial counsel was incompetent because investigation <u>might</u> have disclosed Turner not only used PCP the day of his arrest but habitually used PCP, even on the occasion of each of the crimes for which he was convicted. Turner claims, had his counsel discovered this evidence (which he does not state even exists) counsel

might have been able to present a defense of diminished capacity at trial. There is nothing in the record to show Turner was under the influence of PCP at the time he committed any crime. Further, the most serious crimes of which Turner was convicted -- namely, the rapes -- were general intent, not specific intent, crimes. Thus, a defense of diminished capacity would not have been applicable to them. Again, the appellate record shows no attorney incompetency.

THE TRIAL COURT DID NOT REVERSIBLY ERR IN REFUSING TURNER'S REQUEST TO CHANGE COUNSEL

On the eve of trial Turner moved to replace trial counsel. When the court asked Turner why he wanted his lawyer removed, Turner replied he didn't feel his counsel was "working with me," and had visited him only three or four times in four months. The trial judge asked,

"Mr. Turner, is there anything else you want to tell me?" Turner replied, "No, that's about it."

On this record, the court needed make no further inquiry and was within its discretion to deny Turner's motion to change counsel on the eve of trial.

TURNER'S CONVICTION ON COUNT 32 IS SUPPORTED BY THE RECORD

Turner contends we should reverse as to count 32 -- the robbery of Debra -- because the evidence does not show a taking by means of force or fear from Debra's personal presence.2/ Turner claims he took money from Debra's purse in her living room after he choked her into unconsciousness, asserting he only formed the intent to steal after she was unconscious and did not take by force or

---

2. Turner was sentenced to a total of 174 years and 4 months in prison. His sentence on count 32 was ordered to run concurrently with that sentence.

fear from her presence as required by statute (see § 211).

The evidence, however, would support a conclusion, obviously drawn by the jury, Turner intended both to rob and rape when he attacked Debra -- as he did with 11 other victims using an almost identical modus operandi.

Turner had the opportunity to present his side of the evidence to the jury; it is only our function to determine whether substantial evidence supports the jury's verdict. Here, the verdict is amply supported.

FAILURE TO INSTRUCT ONE OF THE ALTERNATE JURORS TWICE DOES NOT CONSTITUTE REVERSIBLE ERROR

In his opening brief, Turner contends one of the alternate jurors who ultimately voted on the verdicts of guilty was not completely instructed in the law because he came in in the middle of instruction to the rest of the jury.

However, the alternate juror was originally fully instructed along with the rest of the jury. The incident to which Turner refers was a reinstruction of the jury on the request of one of the original jurors. At this time the alternate juror was not yet one of the deliberating panel and had already been fully instructed on all issues. Turner does not show how he was prejudiced by the alternate being present during the rehearing of instructions with which he had already been charged.

TURNER'S SENTENCE IS CONSTITUTIONAL

Turner argues his prison sentence of 174 years and 4 months violates the proscriptions of the United States and California Constitutions against cruel and unusual punishment because it is disproportionate to the crimes he committed. Turner asserts he was sentenced, in effect, to life without the

possibility of parole. In fact, the record reflects he was properly sentenced according to relevant statutes. The length of his sentence is directly related to his penchant for repeating his criminal activities.

Turner relies on In re Lynch, 8 Cal.3d 410, for the proposition a punishment is unconstitutional if it is greater or equal to the punishment prescribed for more serious offenses. This case is readily distinguishable from Lynch. Lynch struck down a penalty of life imprisonment for one count of indecent exposure. In doing so, the Lynch court relied partly on the triviality of the offense, and the relative lack of serious danger to society. In contrast, Turner committed 17 separate, forcible rapes, as well as various other serious offenses. Turner argues as if his sentence were imposed

for a single isolated act of rape, rather than for a continuous pattern of serious violent conduct. The Legislature has not authorized a sentence of 174 years for a single act of rape, nor has Turner been sentenced for a single act of rape. The Legislature has made clear, however, its intent to punish those who perpetrate multiple forcible sex crimes for each separate victim. (§ 667.6, subd. (d).) In view of the number and nature of Turner's crimes, we do not believe the sentence given him is unconstitutional under the authorities on this question. (Cf. In re Lynch, supra, 8 Cal.3d 410; People v. Karsai, 131 Cal.App.3d 224, 240-243.)

Finally, Turner suggests he is a very sick individual, who should be given help, not prison. This concern is one for the Legislature.

Disposition

Affirmed.

[Signed]
WORK, J.

WE CONCUR:

[Signed]
BROWN, P.J.

[Signed]
LEWIS, J.*

*Assigned by the Chairperson of the Judicial Council.

APPENDIX E

APPENDIX E

MINUTES

SUPREME COURT

San Francisco, September 30, 1987

. . . .

(1 Dist. A027842 Div. 4 S001658) - People v. Aaron Lee Katz. Panelli, J., did not participate. Appellant's petition for review denied.

(1 Dist. A028960 Div. 1 S001795) - People v. Alan Wayne Fredericksen. Appellant's petition for review denied.

(1 Dist. A021872 Div. 2 S001812) - Royal Company Auctioneers, Inc., Respondent v. Coast Printing Equipment Company, Inc., et al., Appellants [193 Cal.App.3d 868]. Appellant's petition for review denied.

(1 Dist. A033380 Div. 4 S002146) - In re Marriage of Stringer; Stringer v. Huet. Appellant's petition for review denied.

(1 Dist. A0033766 Div. 4 S002127) - Sullwold et al. v. Abbett Electric Corporation [193 Cal.App.3d 708]. Respondent's petition for review denied.

(1 Dist. A034768 Div. 4 S002157) - People v. Michael Cushway [193 Cal.App.3d 776]. Appellant's petition for review denied.

(1 Dist. A035843 Div. 4 S002173) - People v. Corey Nevin Marshall. Appellant's petition for review denied.

(1 Dist. A027391 Div. 4 S002069) - In re Michael A. Ables on Habeas Corpus. Petition for review denied.

(1 Dist. A038640 Div. 1 S002108) - Sampson, Petitioner v. Workers' Compensation Appeals Board et al., Respondents. Petition for review denied.

(1 Dist. A039130 Div. 5 S002124) - Pagliasso, Petitioner v. Workers' Compensation Appeals Board et al., Respondents. Petition for review denied.

(1 Dist. A039644 Div. 5 S002308) - Black, Petitioner v. Superior Court of the City and County of San Francisco, Respondent; Kitchens, Real Party in Interest. Petition for review denied.

(1 Dist. A039695 Div. 2 S002373) - In re Ovell While on Habeas Corpus. Application for stay and petition for review denied.

(2 Dist. B008759 Div. 3 S002192) - Jones et al., Respondents v. Bugaj et al., Appellants. Respondents' petition for review denied.

(2 Dist. B009461 Div. 4 S002191) - Ledesma v. Patel et al. Respondents' petition for review denied.

(2 Dist. B009562 Div. 5 S002144) - Velzy Engineering and Machine, Inc., etc., Respondent v. Western Industrial Corporation et al., Appellants. Appellants' petition for review denied. The request for an order directing

publication of the opinion in the above entitled cause is denied.

(2 Dist. B015725 Div. 1 S002118) - Krone et al. v. Mission Insurance Company et al. Panelli, J., did not participate. Petition for review of respondents Arrow Insurance Company and Sam Arouesty denied.

(2 Dist. B016357 Div. 5 S002047) - Camacho et al., Respondents v. Schaefer, Appellant [193 Cal.App.3d 718]. Respondent's petition for review denied.

(2 Dist. B016415 Div. 6 S002052) - Baker, Respondent v. Collins, Appellant. Appellant's petition for review denied.

(2 Dist. B016951 Div. 7 S002092) - Petersons, M.D. v. Dolinky et al. Respondents' petition for review denied.

(2 Dist. B018776 Div. 4 S001958) - People v. Eddie Gerry Story. Appellant's petition for review denied.

(2 Dist. B021288 Div. 6 S001736) - People v. Leroy Jack Massey [192 Cal.App.3d 819]. Appellant's petition for review denied.

(2 Dist. B021411 Div. 2 S002111) - People v. Richard Johnson. Appellant's petition for review denied.

(2 Dist. B021785 Div. 5 S002147) - Martinez et al. v. Pacific Telephone etc. et al. Appellant's petition for review denied.

(2 Dist. B021787 Div. 7 S002120) - People v. Regina Navarro. Appellant's petition for review denied.

(2 Dist. B022653 Div. 2 S002176) - People v. George Raymond Ernesto Lewis. Appellant's petition for review denied.

(2 Dist. B022743 Div. 5 S001949) - Victor Martinez Rodriguez, Petitioner v. Superior Court of the County of Los Angeles, Respondent; People, Real Party

in Interest. Petition for review is denied.

(2 Dist. B023051 Div. 7 S001757) - People v. Jose Francisco Ochoa et al. Petition for review of appellant Julian Vargas denied.

(2 Dist. B023140 Div. 5 S002145) - Morton, Petitioner v. Workers' Compensation Appeals Board et al., Respondents [193 Cal.App.3d 924]. Petition for review denied.

(2 Dist. B026943 Div. 3 S001979) - Landmark Holding Group, Inc. et al., Petitioners v. Superior Court of the County of Los Angeles, Respondent; California Bell Club et al., Real Parties in Interest. [193 Cal.App.3d 525]. Respondent's petition for review denied.

(2 Dist. B027472 Div. 2 S002174) - Kim, a Minor, etc. et al. v. Orange County et al. Appellant's petition for review denied.

(2 Dist. B027542 Div. 2 S001732) - Natca, Inc. et al., Petitioners v. Superior Court of the County of Los Angeles, Respondent; Holiday Inn, Inc. et al., Real Parties in Interest. Petitioners' petition for review denied.

(2 Dist. B027663 Div. 5 S002097) - Thomas, Petitioner v. Workers' Compensation Appeals Board et al., Respondents. Petition for review denied.

(2 Dist. B028178 Div. 7 S001574) - Michael Alexander, Petitioner v. Superior Court of the County of Los Angeles, Respondent; Growth Investments, Inc., etc. et al., Real Parties in Interest. Petition for review denied.

(2 Dist. B029155 Div. 1 S002109) - Kitchell Contractors, Inc., Petitioner v. Superior Court of the County of Los Angeles, Respondent; The Lutheran Hospital Society of Southern California

al., Real Parties in Interest. Petition for review denied.

(3 Dist. C001151 S002228) - People v. Troy Adam Ashmus. Appellant's petition for review denied.

(3 Dist. C002547 S001960) - American Standard, Petitioner v. Superior Court of the County of Sacramento, Respondent; Southern Pacific Transportation Company, Real Party in Interest. Petition for review denied.

(3 Dist. C001334 S001686) - People v. Sandra Lee Ellington. Appellant's petition for review denied.

(3 Dist. C001388 S001837) - People v. Ralph Hernandez Aguilar. Appellant's petition for review denied.

(3 Dist. C001524 S001744) - People v. Clifton Williams. Appellant's petition for review denied.

(4 Dist. D004320 Div. 1 S002179) - O'Rourke et al. v. Department of Social

Services, etc. Appellant's petition for review denied.

(4 Dist. D004733 Div. 1 S001956) - People v. Chris Leon Spells. Petitions for review denied.

(4 Dist. D006656 Div. 1 S002110) - Intervest Resources, Inc., Petitioner v. Superior Court of the County of San Diego, Respondent; Poinsettia Park Joint Venture et al., Real Parties in Interest. Petition for review denied.

(4 Dist. G003404 Div. 3 S001930) - People v. Dat Vuong. Appellant's petition for review denied.

(4 Dist. G003469 Div. 3 S001706) - People v. Marjorie Jane Mobley. Appellant's petition for review denied.

(4 Dist. G005635 Div. 3 S001982) - James Clifford Logan, Petitioner v. Superior Court of the County of Orange, Respondent; People, Real Party in Interest. Petition for review denied.

(5 Dist. F006408 S001816) - People v. Howard Lee Rufus. Appellant's petition for review denied.

(5 Dist. F007525 S001710) - In re Eladio Johnny A., a Minor; People v. Eladio Johnny A. Appellant's petition for review denied.

(5 Dist. F009008 S002129) - Pepsi Cola San Joaquin Bottling Company et al., Petitioners v. Superior Court of the County of Stanislaus, Respondent; McGee et al., Real Parties in Interest. Petitioners' petition for review denied.

(6 Dist. H001687 S001622) - People v. Bobby Ray Wittmeier. Appellant's petition for review denied. The request for an order directing publication of the opinion in the above entitled cause is denied.

(6 Dist. H003225 S002114) - Davis, Petitioner v. Workers' Compensation

Appeals Board et al., Respondents. Petition for review denied.

(6 Dist. H003349 S001822) - In re Charles Fleck on Habeas Corpus. Petition for review denied.

(6 Dist. H003427 S002141) - Joseph Robert Reuter, Petitioner v. Superior Court of the County of Santa Clara, Respondent; Silva, etc., Real Party in Interest. Petition for review denied.

APPENDIX F

APPENDIX F

TABLE T-1--CALIFORNIA SUPREME COURT SUMMARY OF FILINGS FISCAL YEARS 1976-77 THROUGH 1985-86

Fiscal year	Total filings	Petitions for review in cases previously decided by Courts of Appeal[1]		
		Total	Appeals	
			Civil	Crim.
			NUMBER	
1976-77	3,665	2,927	1,230	1,033
1977-78	3,881	3,140	1,186	1,170
1978-79	3,612	3,006	812	1,100
1979-80	3,858 [2]	3,183	944	1,100

1. A petition for review in the Supreme Court was formerly called a petition for hearing. The name was legally changed by Proposition 32, which took effect on May 6, 1985. Prior to 1978-79, a change in the method of counting petitions for hearing inadvertently introduced a change in definition. Petitions for hearing in 1978-79 and subsequent years are correct. Data reported for prior years may not, therefore, be fully comparable to the data for 1978-79 and subsequent years.

2. Three petitions were withdrawn after filing.

TABLE T-1--CONTINUED

Fiscal year	Total filings	Petitions for review in cases previously decided by Courts of Appeal: Total	Appeals: Civil	Appeals: Crim.
			NUMBER	
1980-81	3,864	3,179	925	1,132
1981-82	4,056 [3/]	3,338	921	1,148
1982-83	3,856	3,205	942	1,050
1983-84	4,025	3,244	1,100	1,071
1984-85	4,370	3,464	1,020	1,203
1985-86	4,827	3,834	1,044	1,444
. . . .				

3. Since 1981-82, based on a count of petitions filed. Count in prior years was based on the record of those disposed of during the fiscal year because of the short time between filing and action upon a petition (see Cal. Rules of Court, rule 28(a) and (e)).

TABLE T-6--CALIFORNIA SUPREME COURT PETITIONS FOR REVIEW GRANTED AND DENIED BY TYPE OF PROCEEDING

Fiscal Years . . . 1985-86

Type of proceeding	1985-86 Total Decided	Granted No.	Granted %	Denied
Total	3,728	278	7	3,450
Civil appeals	991	69	7	992
Criminal appeals	1,346	99	7	1,247
Civil original proceedings	876	69	8	807
Criminal original proceedings	515	41	8	474

ORIGINAL

Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-889

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOSEPH COMPOY, WARDEN ATTORNEY
OF THE STATE OF CALIFORNIA

Petitioner,

v.

NATHAN KEVIN TURNER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Daniel H. Bookin *
Dean M. Gloster
Attorneys for Respondent
Nathan Kevin Turner

Farella, Braun & Martel
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400
* Counsel of Record

QUESTION PRESENTED

Should this Court depart from its usual rule, and review a case turning solely on the interpretation of state law and procedure, when the decision of the court below correctly interprets and applies state law?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTRODUCTION	1
STATEMENT OF THE CASE	1
ARGUMENT	3
I. THE DECISION BELOW IS A WHOLLY UNREMARKABLE APPLICATION OF SETTLED PRECEDENT, NOT APPROPRIATE FOR THIS COURT'S REVIEW	3
II. PETITIONER IS ASKING THIS COURT TO SUBSTITUTE ITS JUDGMENT OF CALIFORNIA LAW FOR THE CORRECT ANALYSIS OF THE COURT BELOW	3
A. The Question Presented, Involving Solely The Interpretation Of California Law, Does Not Merit This Court's Attention	4
B. The Interpretation Of California Law By The Court Below Is Correct	4
III. PETITIONER'S CLAIMS THAT THE RULING BELOW WILL CREATE PROBLEMS ARE UNFOUNDED	8
A. The Ruling Below Has Been The Controlling Law In The Ninth And Other Circuits For More Than Ten Years	8
B. The Decision Below Is Fact-Bound And Narrowly Circumscribed By Other Ninth Circuit Precedent	10
C. Petitioner Should Direct His Arguments On The Interpretation Of California Law, In The First Instance, To The California Supreme Court	12
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page(s)
Anderson v. Harless, 459 U.S. 4 (1982)	3, 7
Brown v. Allen, 344 U.S. 443 (1953)	3
Fay v. Noia, 372 U.S. 391 (1963)	3
Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978)	7
Gonce v. Redman, 780 F.2d 333 (3rd Cir. 1985)	11
Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976)	9
Granberry v. Greer, ___ U.S. ___, 107 S.Ct. 1671 (1987)	4
Hall v. Sumner, 682 F.2d 786 (9th Cir. 1982)	5, 9
Harris v. Superior Court, 500 F.2d 1124 (9th Cir. 1974), (en banc) cert. denied, California v. Harris, 420 U.S. 973 (1975)	9, 12
In re Brown, 9 Cal.3d 679, 108 Cal.Rptr. 801 (1973)	4
Journet v. Coombe, 567 F.Supp. 503 (S.D.N.Y. 1983)	10
Kellotat v. Cupp, 719 F.2d 1027 (9th Cir. 1983)	11
Lindquist v. Gardner, 770 F.2d 876 (9th Cir. 1985)	11
Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987)	4
McNulty v. Olim, 652 F.2d 1369 (9th Cir. 1981)	9
McQuown v. McCartney, 795 F.2d 807 (9th Cir. 1986)	12
Murray v. Carrier, 477 U.S. 478 (1986)	4
Parker v. Parratt, 662 F.2d 479 (8th Cir. 1981), cert. denied, 459 U.S. 846 (1982)	10
People v. Angulo, 85 Cal.App.3d 514, 148 Cal.Rptr. 517 (1978)	5
People v. Carter, 275 Cal.App.2d 815, 80 Cal.Rptr. 202 (1969)	5

Cases	Page(s)
People v. Haynes, 104 Cal.App.3d 118, 164 Cal.Rptr. 552 (1980)	6, 7
People v. Phillips, 41 Cal.3d 29, 222 Cal.Rptr. 127 (1985)	6
People v. Pope, 23 Cal.3d 412, 152 Cal.Rptr. 732 (1979)	3,4,5, 6,7,8
People v. Rodriguez, 275 Cal.App.2d 946, 80 Cal.Rptr. 397 (1969)	5
People v. Spring, 153 Cal.App.3d 1199, 200 Cal.Rptr. 849 (1984)	5
People v. Weston, 114 Cal.App.3d 764, 170 Cal.Rptr. 856 (1981)	5
Picard v. Connor, 404 U.S. 270 (1971)	3, 7
Pitchess v. Davis, 421 U.S. 482 (1975)	11
Reed v. Ross, 468 U.S. 1 (1984)	4
Schiers v. People of the State of California, 333 F.2d 173 (9th Cir. 1964)	11
Smith v. Digmon, 434 U.S. 332 (1978)	3, 7
Sumner v. Mata, 449 U.S. 539 (1981)	11
Swanger v. Zimmerman, 750 F.2d 291 (3rd Cir. 1984)	7, 10
Sweet v. Cupp, 640 F.2d 233 (9th Cir. 1981)	11
Tamapua v. Shimoda, 796 F.2d 261 (9th Cir. 1986)	9, 11
Thompson v. Procunier, 539 F.2d 26 (9th Cir. 1976)	4,8,9
Turner v. Compoy, 827 F.2d 526 (9th Cir. 1987)	2,4,11
Walker v. Zant, 693 F.2d 1087 (11th Cir. 1982)	10
Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981) cert denied, 454 U.S. 1091 (1981)	10
Wood v. Georgia, 450 U.S. 261 (1981)	6

Statutes and Other Authorities

Whither (or Wither) Habeas Corpus? Reflections on the Supreme Court's 1985 Term, 111 F.R.D. 265 (1986)	10

INTRODUCTION

The Petition does not deserve this Court's attention. It presents only a question of the interpretation of California procedure, as even Petitioner recognizes. (Petition ("Pet.") at 22.) In attacking the correct interpretation of state law made by the court below, Petitioner has inaccurately characterized California decisional authority. Likewise, Petitioner's exaggerated claims of potential future harm are difficult to credit: The holding below has been settled law for over ten years.

If Petitioner wishes to alter state procedures on addressing ineffective assistance of counsel claims on direct appeal, Petitioner should direct his pleas to California Supreme Court, not this Court. The Petition is simply another attempt to create additional procedural bars to the speedy resolution of Respondent Turner's habeas claims by the District Court, despite settled law of this Court to the contrary. Accordingly, Respondent requests that the Court deny the Petition, allowing Respondent to present his constitutional claims to a federal forum.

STATEMENT OF THE CASE

Facing extremely serious charges, Respondent Nathan Kevin Turner ("Turner") moved before trial to replace his counsel, claiming the attorney was not "working with" him and had demonstrated limited preparation through only minimal contacts with Turner over the four months before trial. (Appendix D to Pet., p. A-37.) The trial judge denied Turner's motion, and at trial Turner was convicted of 46 counts covering various offenses and sentenced to serve 174 years and 4 months in state prison. (Pet., at 7.)

Turner appealed the judgment in state court, raising the claim that he was denied effective assistance of counsel at trial by his counsel's failure to investigate certain defenses, failure to present a diminished capacity defense, failure to consult a

psychiatrist and failure to raise the issue that PCP addiction resembles schizophrenia.[1/] (R5, lodged opening brief.)

Turner's claims were presented in voluminous briefs to the California Court of Appeal, (R5, lodged opening brief), including the merits of his ineffective assistance of counsel claims. The response briefs of the California Attorney General, on behalf of the state, dealt with the merits of Turner's claim at length. (R5, lodged respondent's brief, at pp. 11-16.) The California Court of Appeal, in a fourteen page unpublished opinion, rejected Turner's arguments after explicitly discussing the merits of his ineffective assistance of counsel and other claims. (Appendix D to Pet., at pp. A-33 through A-37.)

The California Supreme Court denied Turner's petition for hearing, likewise accompanied by a voluminous briefing of the issues, (R5, lodged appellant's petition for hearing), without indicating the grounds for denial.

Turner then filed a petition of habeas corpus in federal District Court. Despite Turner's direct appeal to the California Supreme Court, the District Court dismissed his petition for failure to exhaust state remedies, because Turner had not also filed a subsequent state habeas petition.

The Court of Appeals reversed. Turner v. Compoy, 827 F.2d 526 (9th Cir. 1987). After a careful analysis of California case law, the court held that California does not require ineffective assistance of counsel claims such as Turner's to be addressed on the merits only in a state habeas petition. Under California precedents, the state courts are to deny on the merits an ineffective assistance of counsel claim presented on direct appeal if the appellant does not sufficiently allege that counsel's actions fell below the legally required standard or if the record

---

1/ Turner also raised the question of whether a person so severely intoxicated by PCP as to be presumed under the influence is capable of effectively waiving Fifth Amendment Miranda rights to remain silent, whether his sentence of 174 years and 4 months was cruel and unusual, and a variety of other claims.

provides an adequate explanation of trial counsel's tactical choices. Given the California Supreme Court's silence in denying Turner's appeal the Circuit Court presumed, pursuant to long-standing precedent, that the denial was on the merits. Respondent Turner therefore exhausted his state remedies by fully and fairly presenting his claims to the state courts on direct appeal, where they were denied.

ARGUMENT

I. THE DECISION BELOW IS A WHOLLY UNREMARKABLE APPLICATION OF SETTLED PRECEDENT, NOT APPROPRIATE FOR THIS COURT'S REVIEW.

The exhaustion rule requires that the "substance" of a federal constitutional claim has been "fairly presented" to the state courts. Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276 (1982); Picard v. Connor, 404 U.S. 270, 275, 277-78, 92 S.Ct. 509 (1971). Such a claim is "fairly presented" by direct appeal even if the State court does not actually address the claim raised. Smith v. Digmon, 434 U.S. 332, 333, 98 S.Ct. 597 (1978).

Where the state permits alternative methods of review, the federal court does not require the prisoner to exhaust every alternative. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963). Thus, if a state prisoner presents his federal claim on direct review to the state court and it is rejected there, the prisoner need not ask the state for collateral relief based on the same issues in order to exhaust state remedies. Brown v. Allen, 344 U.S. 443 (1953).

The decision of the court below is no more than a fact-bound application of these settled principals.

II. PETITIONER IS ASKING THIS COURT TO SUBSTITUTE ITS JUDGMENT OF CALIFORNIA LAW FOR THE CORRECT ANALYSIS OF THE COURT BELOW.

Petitioner is not asking this Court to overturn its settled precedents. Nor does the Petitioner argue that there is a disagreement among the circuits on this issue. Instead, Petitioner argues that the opinion below misinterprets a California decision, People v. Pope, 23 Cal.3d 412, 152 Cal.Rptr. 732, 590 P.2d 859 (1979). See Pet., at 22. The Circuit Court's interpretation

of California law, however, is entirely correct and is consistent with the interpretation of California's own state courts. The Petition in this case does not present a "special and important reason" for the grant of certiorari, as required by Rule 17 of the Rules of the Supreme Court of the United States.

A. The Question Presented, Involving Solely The Interpretation Of California Law, Does Not Merit This Court's Attention.

As the court below recognized, a state may require that state prisoners present their claims to the state courts via a single procedure as long as the right to review is not unduly limited. Turner v. Compoy, 827 F.2d 526, 528 (9th Cir. 1987); Thompson v. Procunier, 539 F.2d 26, 28 (9th Cir. 1976).2/ The only question, then, raised by Petitioner is whether the California Supreme Court in People v. Pope, 23 Cal.3d 412, 152 Cal.Rptr. 732, 590 P.2d 859 (1979) has required all ineffective assistance claims like Turner's to be presented on state habeas instead of direct review.

The United States Supreme Court is not a court of last resort for the interpretation of various state's laws. Moreover, as this Court recently recognized, the Supreme Court should "defer to the Court of Appeals which is more familiar with [the state court's] practice," on the issue of whether a particular avenue of appeal adequately exhausts state remedies. Granberry v. Greer, ____ U.S. ____, 107 S.Ct. 1671, 1676 n.9 (1987).

B. The Interpretation Of California Law By The Court Below Is Correct.

The California Supreme Court has stated that issues reviewable on direct appeal in California "include those raised by a claimed ineffectiveness of counsel." In re Brown, 9 Cal.3d 679,

---

2/ See also, Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 2646-48 (1986); Reed v. Ross, 468 U.S. 1, 10-12, 104 S.Ct. 2901 (1984); Mann v. Dugger, 817 F.2d 1471, 1474-75 (11th Cir. 1987) (failure to raise a claim on direct appeal as required by state law precludes federal habeas review).

682, 108 Cal.Rptr. 801, 511 P.2d 1153 (1973). On direct appeal, California courts have often reviewed and decided ineffective assistance of counsel claims similar to those urged by Turner. See Hall v. Sumner, 682 F.2d 786, 788 (9th Cir. 1982) (the California state court, on direct appeal, had "reviewed all of Hall's ineffective assistance claims," similar to Turner's here, and found them "meritless"); People v. Spring, 153 Cal.App.3d 1199, 1208, 200 Cal.Rptr. 849 (1984) (denying on the merits an ineffective assistance of counsel claim raised on direct appeal); People v. Weston, 114 Cal.App.3d 764, 778-82, 170 Cal.Rptr. 856 (1981) (the court, citing People v. Pope, determined both the incompetency of counsel claims urged on direct appeal as well as those restated in a joined habeas petition).3/

Nothing in the California Supreme Court's decision in People v. Pope, 23 Cal.3d 412, 152 Cal.Rptr. 732, 590 P.2d 859 (1979) requires petitioners to present their incompetence of counsel claim on state habeas proceedings rather than on direct appeal. To the contrary, Pope specifies that the merits of an ineffective assistance of counsel claim, even based on matters outside the record, may be decided on appeal. Under Pope, "a claim of ineffective assistance is more appropriately made in a petition for habeas corpus," only if (1) the appellant carries the burden of proving that trial counsel failed to act in a manner to be expected of a reasonably competent attorney, (2) appellant demonstrates that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense, and (3) the

---

3/ See also People v. Rodriquez, 275 Cal.App.2d 946, 953-955, 80 Cal.Rptr. 397 (1969) (ineffective assistance of counsel case); People v. Angulo, 85 Cal.App.3d 514, 148 Cal.Rptr. 517 (1978) (holding, on direct appeal, that joint representation of two co-defendants resulted in prejudice, requiring reversal of the judgments); People v. Carter, 275 Cal.App.2d 815, 819-821 80 Cal.Rptr. 202 (1969) (court addresses on appeal incompetence of counsel claim stemming from dual representation).

record contains no explanation for the challenged aspect of representation.[4/] 23 Cal.3d, at 425-426.

Later California decisions have interpreted Pope consistent with this language. For example, in People v. Phillips, 41 Cal.3d 29, 60-62, 222 Cal.Rptr. 127, 711 P.2d 423 (1985), decided after Pope, the California Supreme Court addressed the substance of some of the prisoner's ineffective assistance of counsel theories based on materials outside the record on direct appeal, while leaving others for habeas. See also People v. Haynes, 104 Cal.App.3d 118, 123, 164 Cal.Rptr. 552 (1980) (restating the Pope test consistent with the Ninth Circuit's view).

Here, Turner presented his claims to the state appellate court in voluminous detail. (See R5, lodged opening brief, lodged reply brief). In response, the California Attorney General, representing the state, discussed the facts and briefed the merits of those claims, arguing that even if Turner's version of the facts were true, his allegations did not make out a legally sufficient ineffective assistance claim, and that the record explained his counsel's actions as correct tactical choices. (R5, lodged respondent's brief.)[5/] Given the state's

---

4/ Petitioner's argument that Pope holds that all ineffective assistance arguments based on matters outside the record must be dealt with only on habeas is flatly contradicted by the language of Pope. It is also logically unsupportable. Under Petitioner's theory, this Court's pronouncement in Wood v. Georgia, 450 U.S. 261, 274 n.21, 101 S.Ct. 1097 (1981), refusing to vacate a state criminal judgment on appeal but stating that "relief may be available in habeas corpus proceedings," would thereafter be read as an inflexible pronouncement that dual representation attorney conflict of interest claims may not be reviewed on direct appeal by the U.S. Supreme Court, under any circumstances.

5/ Specifically, the state argued that even assuming that Turner was on PCP at the time of his confession, his confession was still voluntary (R5, lodged respondents' brief, at 13-14); that Turner's counsel "was as effective as possible given the facts and circumstances of his case," (id., at 15); that diminished capacity was not a potentially meritorious defense or a defense to the general intent crime charges against Turner, (id., at 16); that the record explained counsel's choice to forego pursuing the PCP-based defense as the most effective tactical course of action: That to claim Turner was not the assailant was more persuasive than trying to claim, inconsistently, both that Turner wasn't the assailant and that he committed the acts, but
(footnote continued)

arguments, the state appellate court could determine Turner's ineffective assistance of counsel and other claims on the merits under Pope, rather than deferring their consideration until habeas. People v. Pope, 23 Cal.3d, at 425; People v. Haynes, 104 Cal.App.3d, at 123.

Petitioner makes a lengthy argument that denial of a petition by the California Supreme Court should not be taken as a determination on the merits of a case. (Pet., at 17-23.) This extensive discussion is simply irrelevant: A state court cannot prevent the exhaustion of a federal claim by simply refusing to address it. Smith v. Digmon, 434 U.S. 332, 333, 98 S.Ct. 597 (1978), Swanger v. Zimmerman, 750 F.2d 291, 295 (3rd Cir. 1984). Where exhaustion is concerned, the question is not whether the state court has passed on the merits of the constitutional claim presented, but rather whether the federal claims have been "fairly presented," whether decided or not. Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276 (1982); Picard v. Connor, 404 U.S. 270, 275, 277-78, 92 S.Ct. 509 (1971).6/ The State Court of Appeals explicitly dealt with the merits of Turner's claims under the analysis set out in Pope. Turner's voluminous briefs set out his legal theories and the factual basis for his claims. Under the circumstances, the holding below correctly concluded that Turner had provided an adequate opportunity for the state courts to pass upon the merits of his federal claim.

Further, the Circuit Court's statement that it presumed the California Supreme Court denied Turner's direct appeal on the

---

suffered from diminished capacity on each of the many nights in question. (Id., at pp. 15-16.) After arguing each of Turner's contentions on the merits, the state raised, in one page of their 21-page Brief, the alternative argument that Turner's failure to provide an adequate record precluded review on appeal. (Id., at p. 17.)

6/ As one court explained, "[c]omity does not require that the federal courts decline to exercise jurisdiction in the face of allegations that the state courts have been presented with the merits of the claims for habeas corpus relief and have, for one reason or another, refused or been unable to act upon the claim." Galtieri v. Wainwright, 582 F.2d 348, 354 n.12 (5th Cir. 1978).

merits was simply a shorthand for the court's more lengthy analysis: Given the reasoning in Pope and the basis of Turner's claims, the Ninth Circuit refused to interpret the California Supreme Court's silence as a statement that its denial of review was premised on a holding that Turner should have brought his claim on state habeas.7/

III. PETITIONER'S CLAIMS THAT THE RULING BELOW WILL CREATE PROBLEMS ARE UNFOUNDED.

A. The Ruling Below Has Been The Controlling Law In The Ninth And Other Circuits For More Than Ten Years.

Petitioner devotes much of the petition to a speculative argument that the decision below "creates serious and important problems" because it will allow habeas petitioners to bypass the state courts in the future. (Pet., at pp. 13-35.) It is difficult to credit the Petitioner's argument, since the rule below has been the law in the Ninth and other Circuits for over ten years, without any appreciable showing of harm.

The Ninth Circuit's decision in Thompson v. Procunier, 539 F.2d 26 (9th Cir. 1976) is particularly instructive. Exactly contrary to the argument the California Attorney General now makes on behalf of Petitioner, there he suggested that presenting ineffectiveness of counsel claims to the California courts on habeas was improper; that such claims must be brought on direct appeal to adequately exhaust remedies. 539 F.2d at 27-28.

In response, the Ninth Circuit held in Thompson that ineffective assistance claims may be presented by direct appeal in California, but that "a federal court will not, prior to granting habeas relief, require that a petitioner, in a state where [two] alternative methods of reviewing and Constitutional issues are

---

7/ Given the particular facts of this case and the unique analysis California courts are to go through under Pope, this holding is unremarkable. This Petition does not present the question of whether a federal habeas petition should be barred for an independent and adequate state procedural ground when that ground appears in the record and the state courts deny review without indicating that they have reached the merits.

available, exhaust [both] alternatives." 539 F.2d at 28. The court went on to conclude "where a petition for a writ of habeas corpus presenting a federal constitutional question is denied by a state court with no reason given, we will assume the state court has had an opportunity to pass upon the merits of the issue and has resolved it against the petitioner." Id. 8/

Similarly, in Hall v. Sumner, 682 F.2d 786 (9th Cir. 1982), the state prisoner raised ineffective assistance of counsel claims almost identical to Turner's -- failure to investigate facts and the defenses of diminished capacity and insanity -- via direct appeal in California. The presentation of these claims in the briefs and their rejection by the state courts adequately exhausted state remedies, and it was not necessary for the prisoner to file a state habeas petition in order to attack his conviction collaterally in federal court. 682 F.2d, at 788.

Petitioner predicts dire consequences in the future from the ruling below, but has failed to show any harm that has occurred during the past twelve years while the rule of law in the

---

8/ See Gonzales v. Stone, 546 F.2d 807, 808 & n.2 (9th Cir. 1976) (where a California prisoner presents his ineffective assistance of counsel claim on direct appeal, he is not further "required to show that he sought collateral review in the state courts," and such an "additional step is not a condition to petitioning for federal habeas corpus relief"); Harris v. Superior Court, 500 F.2d 1124, 1128-29 (9th Cir. 1974) cert. denied, California v. Harris, 420 U.S. 973 (1975) (rejecting arguments by the California Attorney General that there was no exhaustion of remedies because the California Supreme Court may have denied the petition for review "on procedural rather than on substantive grounds," and holding that when the California Supreme Court "denies a habeas corpus petition without opinion or citation, or when it otherwise decides on the merits of the petition, the exhaustion requirement is satisfied"); see also Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986) (exhaustion requirements were satisfied once the prisoner's claim was fairly presented to the highest court of Hawaii, describing the operative facts and the legal theory on which his claim is based); McNulty v. Olim, 652 F.2d 1369, 1370 (9th Cir. 1981) (holding that even though the Hawaii Supreme Court "did not explicitly cast its discussion on the effectiveness of the appellant's trial counsel in Constitutional terms, we are convinced that the issue the appellant seeks to have reviewed by means of his petition for a writ of habeas corpus was presented to the Supreme Court of Hawaii fully, fairly, and precisely. Therefore, appellant has exhausted his state remedies without regard to whether further collateral relief might be available to him under Hawaii law").

decision below was the status quo.[9] The rule below is also the settled law in other circuits.[10]

B. The Decision Below Is Fact-Bound And Narrowly Circumscribed By Other Ninth Circuit Precedent.

In this somewhat unusual case, Turner presented voluminous briefs summarizing the factual and legal basis for his arguments both to the California Court of Appeals and the California Supreme Court. The California Court of Appeals explicitly dealt with those claims on the merits. The Ninth Circuit's decision that under the circumstances the "substance" of Turner's federal Constitutional claim was "fairly presented" to the state courts is fact-bound, as other Ninth Circuit decisions reveal by narrowly circumscribing the holding of the case below. These other

---

9/ As one commentator notes, habeas corpus cases as a percentage of the federal courts' civil caseload have actually decreased to 3.5% of the caseload; over a period of time when the number of state prisoners increased by 150%, the number of federal habeas petitions remained relatively static. Whither (or Wither) Habeas Corpus?: Reflections on the Supreme Court's 1985 Term, 111 F.R.D. 265, 266-67 (1986).

10/ See, e.g., Walker v. Zant, 693 F.2d 1087, 1088 (11th Cir. 1982) (summary denial by Georgia Supreme Court of direct appeal raising insufficient preparation of counsel issue sufficiently exhausted state remedies; no need for petitioner to also seek state collateral relief); Parker v. Parratt, 662 F.2d 479, 482 (8th Cir. 1981), cert. denied, 459 U.S. 846 (1982) (failure by the Nebraska Supreme Court to dispose of the petitioners' Sixth Amendment issues raised on direct appeal did not prevent that direct appeal from adequately exhausting state remedies, since it was "enough that the state court was on notice of the question and was presented the opportunity to rule"); Wiley v. Sowders, 647 F.2d 642, 647 (6th Cir.), cert. denied, 454 U.S. 1091 (1981), (direct appeal to the Kentucky Supreme Court of the petitioners' ineffective assistance claims sufficiently exhausted state remedies where the briefs to the Kentucky Supreme Court fairly presented the claim even though "the Kentucky Supreme Court refused to decide an issue put squarely before it"); Journet v. Coombe, 567 F.Supp. 503, 504-505 (S.D.N.Y. 1983) (direct appeal of an ineffective assistance of counsel claim adequately exhausted state remedies even though the petitioner's conviction was affirmed without opinion by the appellate division and the highest court of New York denied leave to appeal); see also, Swanger v. Zimmerman, 750 F.2d 291, 295 (3rd Cir. 1984) (direct appeal satisfies the exhaustion requirement even if the appellate court does not discuss the claim; the habeas corpus petitioner need not also raise the claim on state collateral attack before proceeding to federal court).

Ninth Circuit decisions and this Court's precedents render Petitioner's speculation of harm wholly unfounded.

The Ninth Circuit's ruling in Turner is limited by that Circuit's settled law that if a prisoner's claim based on material outside the record is not actually raised in the papers on direct appeal, then the prisoner has not exhausted his state remedies. Schiers v. People of California, 333 F.2d 173, 176 (9th Cir. 1964) (ineffective assistance of counsel claim).[11/] Further, where there are alternative remedies available, the petitioner may not attempt to exhaust state remedies by invoking a state procedure which is an extraordinary remedy that does "not create a fair opportunity for decision" by the state courts. Kellotat v. Cupp, 719 F.2d 1027, 1031 (9th Cir. 1983) (petition to the Oregon Supreme Court for interlocutory review does not constitute exhaustion).[12/]

Petitioner's argument that the decision below deprives the state courts of the opportunity to adjudicate the facts before they are decided by a federal court also ignores this Court's ruling in Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764 (1981).

11/ A claim is fairly presented, and state remedies adequately exhausted, only if "the petitioner has described the operative facts and legal theory on which his claim is based." Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). Here, the briefs of respondent and of the state in the earlier state proceedings were lodged with the district court, permitting the federal court to consider the arguments made to the state court in its assessment of whether state remedies had been adequately exhausted. (R5, lodged briefs.) Compare Gonce v. Redman, 780 F.2d 333, 336 (3rd Cir. 1985) (where the state court does not indicate in its opinion that the federal claims were presented, and the petitioner fails to make the briefs from his state court proceeding part of the record in his federal habeas proceeding, the federal court will assume that the state courts were not provided an opportunity to pass upon the claims).

12/ See Lindquist v. Gardner, 770 F.2d 876 (9th Cir. 1985) (petition for an original writ of habeas corpus to the Idaho Supreme Court does not constitute exhaustion of state remedies); Sweet v. Cupp, 640 F.2d 233 (9th Cir. 1981) (writ of original habeas corpus jurisdiction in the Oregon Supreme Court does not constitute exhaustion of remedies); see also Pitchess v. Davis, 421 U.S. 482 (1975) (application to the state court for an extraordinary writ of prohibition on a question that can be raised in the ordinary course of state proceedings does not constitute adequate exhaustion).

There, this Court held that facts, if addressed and decided on direct appeal by a state court, are binding on a federal habeas court.

C. Petitioner Should Direct His Arguments On The Interpretation Of California Law, In The First Instance, To The California Supreme Court.

As the Ninth Circuit indicated in refusing to stay its mandate in this case, if the California Supreme Court wishes federal courts to treat the denial of an appeal as a decision on procedural, rather than substantive grounds, the California Supreme Court can so indicate in a single sentence when it denies the appeal. Petitioner is reduced to arguing that adding this single sentence would unduly burden the California Supreme Court. (Pet., at 26-28.) It should be noted that in the past, the California Supreme Court has indicated its summary denial of a hearing was based on procedural grounds. See, e.g., McQuown v. McCartney, 795 F.2d 807, 808 & n.1, 809 (9th Cir. 1986); Harris v. Superior Court, 500 F.2d 1124 (9th Cir. 1974) (en banc), cert. denied, 420 U.S. 973, 103 S.Ct. 1394 (1975).

Petitioner ignores that if the California Supreme Court wishes to change its rules and require that ineffective assistance of counsel claims be dealt with by state habeas review, the California Supreme Court is free to do so. As discussed above, that is not the current rule under California state law. If the California Attorney General wishes the rule to be changed, he should direct his request to the California Supreme Court, not this one.

CONCLUSION

Petitioner misunderstands the doctrine of exhaustion of state remedies, which requires only that the substance of the federal claim be fairly presented to the state courts. The narrow and largely fact-bound decision below correctly found that Turner's claims were adequately presented under California law.

Accordingly, Respondent respectfully requests the Court to deny the Petition and permit him his day in federal court.

Respectfully submitted,

Daniel H. Bookin *
Dean M. Gloster
Attorneys for Respondent
Nathan Kevin Turner

Farella, Braun & Martel
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400
* Counsel of Record

April 14, 1988

No. 87-889

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOSEPH COMPOY, WARDEN ATTORNEY
OF THE STATE OF CALIFORNIA

Petitioner,

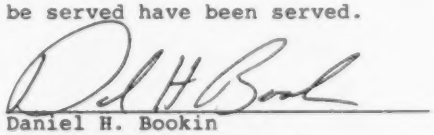
v.

NATHAN KEVIN TURNER,

Respondent.

CERTIFICATE OF SERVICE

I, Daniel H. Bookin, a member of the Bar of this Court, hereby certify that on this 14th day of April, 1988, one copy of the Motion for Leave to Proceed In Forma Pauperis and one copy of the Brief in Opposition to the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to John K. Van De Kamp, Attorney General of the State of California, 110 West A Street, Suite 700, San Diego, California 92101, Attention: Raquel M. Gonzalez, Deputy Attorney General, counsel for petitioner herein. I further certify that all parties required to be served have been served.



Daniel H. Bookin
Farella, Braun & Martel
235 Montgomery Street
Suite 3000
San Francisco, CA 94104
Telephone: (415) 954-4400
Counsel for Respondent